

**OFFICIAL CODE  
OF  
GEORGIA**  

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**ANNOTATED**



**VOLUME 29A**

Title 41. Nuisances

Title 42. Penal Institutions

1997 Edition









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# OFFICIAL CODE OF GEORGIA ANNOTATED

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With Provision for Subsequent Pocket Parts

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*Prepared by*  
The Code Revision Commission  
The Office of Legislative Counsel  
*and*  
The Editorial Staff of Michie



Published Under Authority of the State of Georgia

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## **Volume 29A** **1997 Edition**

Title 41. Nuisances  
Title 42. Penal Institutions

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Including Acts of the 1997 Session of the General Assembly and  
Notes to the Georgia Reports Through Volume 267, page 438,  
and the Georgia Appeals Reports Through  
Volume 223, page 902

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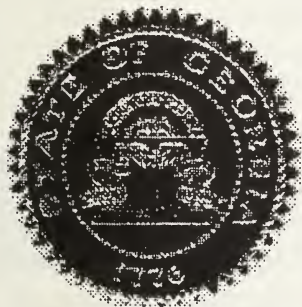
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material as enacted by the General Assembly of Georgia; all as  
the same appear of file and record in this office.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed  
the seal of my office, at the Capitol, in the City of Atlanta, this  
16th day of June, in the year of our Lord  
One Thousand Nine Hundred and Ninety seven  
and of the Independence of the United States of America the  
Two Hundred and Twenty first.

*Lewis A. Massey*  
SECRETARY OF STATE





## Preface

Volume 29 and this volume cumulate and replace the 1994 edition of Volume 29 of the Official Code of Georgia Annotated, as supplemented by the 1996 Supplement. The 1994 edition of Volume 29 and its 1996 Supplement may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Titles 41 and 42 by the General Assembly through the 1997 Session. This volume also contains annotations to the following sources:

- Georgia Reports, volume 267, p. 438.
- Georgia Appeals Reports, volume 223, p. 902.
- Southeastern Reporter, Second Series, volume 480, p. 185.
- Federal Reporter, Third Series, volume 104, p. 1348.
- Federal Supplement, volume 950, p. 356.
- Federal Rules Decisions, volume 170, p. 29.
- Bankruptcy Reporter, volume 200, p. 970.
- Supreme Court Reporter, volume 117, p. 854.
- Lawyers' Edition, Second Series, volume 136, p. 695.
- United States Reports, volume 513, p. 1302.
- Opinions of the Attorney General, No. 97-5 and No. U97-9.

Also included are references to the following sources:

- Emory Law Journal.
- Georgia Law Review.
- Georgia State University Law Review.
- Mercer Law Review.
- Georgia State Bar Journal.
- American Jurisprudence, Second Edition.
- Corpus Juris Secundum.
- Uniform Laws Annotated.
- American Law Reports, First through Fifth Series.
- American Law Reports, Federal Series.

This volume retains amendment notes and effective date notes for Acts passed during the 1995, 1996, and 1997 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed during the 1982 through 1994 Sessions of the General Assembly, the user should consult the Georgia Laws.

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## **User's Guide**

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.





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## **TITLE 41**

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CHAPTER 1

GENERAL PROVISIONS

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41-1-2.	Classes of nuisances; public and private nuisances defined.	41-1-6.	Erection or continuance of nuisance after notice to abate.
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41-1-1. Nuisance defined generally.

A nuisance is anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary, reasonable man. (Orig. Code 1863, § 2942; Code 1868, § 2949; Code 1873, § 3000; Code 1882, § 3000; Civil Code 1895, § 3861; Civil Code 1910, § 4457; Code 1933, § 72-101.)

**Cross references.** — Causes of action and remedies for injuries to real estate, Ch. 9, T. 51.

**Law reviews.** — For article, "Recommendations Regarding Control of Outdoor Advertising Along the Interstate Highway System in Georgia," see 14 Mercer L. Rev. 308 (1963). For article discussing Georgia's practice of exposing municipalities to tort liability through the use of nuisance law, see 12 Ga. St. B.J. 11 (1975). For article discussing nuisances as "Hidden Liens," see 14 Ga. St. B.J. 32 (1977).

For note, "Town of Fort Oglethorpe v. Phillips: A Clarification of Georgia's Public Nuisance Law?," see 5 Ga. St. B.J. 474 (1969). For note analyzing sovereign immu-

nity in this state and proposing implementation of a waiver scheme and creation of a court of claims pursuant to Ga. Const. 1976, Art. VI, Sec. V, Para. I, see 27 Emory L.J. 717 (1978).

For comment on *Collins v. Lanier*, 201 Ga. 527, 40 S.E.2d 424 (1946), see 9 Ga. B.J. 325 (1947). For comment on *Gatewood v. Hansford*, 75 Ga. App. 567, 44 S.E.2d 126 (1947), see 10 Ga. B.J. 372 (1948). For comment on *Bennett v. Bagwell & Stewart*, 214 Ga. 113, 103 S.E.2d 561 (1958), holding that as a nuisance is a continuing trespass, a court in equity will enjoin it in the county of the resident defendant even though he is only an agent or employee of the nonresident defendant, see 21 Ga. B.J. 564 (1959).

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**General Consideration**

**Constitutionality.** — The statutory definition of a nuisance is not vague and indefinite and therefore unconstitutional. *Atlanta Processing Co. v. Brown*, 227 Ga. 203, 179 S.E.2d 752 (1971).

**Effect on common-law definition.** — This section was not intended to change the common-law definition of a nuisance. *State ex rel. Boykin v. Ball Inv. Co.*, 191 Ga. 382, 12 S.E.2d 574 (1940).

**Effect of Federal Aviation Act of 1958.** — Federal Aviation Act of 1958, 49 U.S.C. § 1506, does not abridge or alter remedies existing at common law or by statute, and the provisions of this act are in addition to such remedies. *Owen v. City of Atlanta*, 157 Ga. App. 354, 277 S.E.2d 338, aff'd, 248 Ga. 299, 282 S.E.2d 906 (1981), cert. denied, 456 U.S. 972, 102 S. Ct. 2235, 72 L. Ed. 2d 846 (1982).

**Implied private right of action under federal statute.** — Where the cause of action is one that is traditionally relegated to state law, such as a nuisance action which is a classic area in which state law controls, under the United States Supreme Court's four-pronged test to be applied in analyzing the propriety of allowing a case to be maintained as an implied private right of action under a federal statute not specifically creating such a right, it is inappropriate to infer a cause of action based solely on federal law; this is especially true now, since the United States Supreme Court has directed the federal courts to concentrate on the second criterion of the four-pronged test, namely, the question of congressional intent to create or deny a right of recovery under the federal law. *Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434 (5th Cir.), cert. denied, 454 U.S. 1126, 102 S. Ct. 977, 71 L. Ed. 2d 114 (1981).

**No presumption of legislative intent to authorize nuisance.** — It is never to be presumed that the Legislature intended to authorize a corporation to erect a nuisance materially tending to destroy the life or

health of others. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

**This section does not legalize a nuisance.** *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 100 S.E. 207 (1919); *Cox v. DeJarnette*, 104 Ga. App. 664, 123 S.E.2d 16 (1961).

**Indictable nuisances under § 41-1-6.** — This section is not the test of indictable nuisances under § 41-1-6. *Central of Ga. Power Co. v. State*, 10 Ga. App. 448, 73 S.E. 688 (1912).

**Right of plaintiff must have been violated.** — The act, to constitute a nuisance, must be in violation of some right of the plaintiff. *Sheppard v. Georgia Ry. & Power Co.*, 31 Ga. App. 653, 121 S.E. 868 (1924).

**The expression "may otherwise be lawful"** shows in this section that the act complained of, insofar as it causes "hurt, inconvenience, or damage to another" must be unlawful — that is a violation of some right of plaintiff — to constitute a nuisance. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938); *Lawrence v. City of La Grange*, 63 Ga. App. 587, 11 S.E.2d 696 (1940).

**Condition causing hurt or inconvenience.** — Notion of "illegality" in Georgia involves much more than failure to comply with some particular directives which may or may not apply to an instrumentality at a given time. A condition may be illegal when it is objectionable only on grounds of causing "hurt or inconvenience," i.e., when it is a nuisance. This conclusion is directly authorized by the statutory definition of nuisance. *Banks v. City of Brunswick*, 529 F. Supp. 695 (S.D. Ga. 1981), aff'd, 667 F.2d 97 (11th Cir. 1982).

**Distinction between negligence and nuisance.** — In cause of action brought under nuisance exception to municipal immunity, as to a jury's questions concerning nuisance and the ordinary reasonable man standard found in this section, the only real distinction between negligence and nuisance would seem to be that the latter involves a continued or repeating condition. One may, of course, dispute whether any negligence

**General Consideration (Cont'd)**

was involved in design and maintenance of a traffic signal. But, there would appear to be no room at all to doubt that the light was a repeating instrumentality. Thus, if there were negligence in design or maintenance, that negligence would of necessity give rise to a nuisance. Certainly a jury was authorized to so find, particularly in light of police officers' testimony that the light was a known hazard. *Banks v. City of Brunswick*, 529 F. Supp. 695 (S.D. Ga. 1981), *aff'd*, 667 F.2d 97 (11th Cir. 1982).

**Conformity to general law is no defense to nuisance action.** *Banks v. City of Brunswick*, 529 F. Supp. 695 (S.D. Ga. 1981), *aff'd*, 667 F.2d 97 (11th Cir. 1982).

**Qualification on use of property.** — The right to use one's property as he pleases implies a like right in every other person, and is qualified by the doctrine that the use in the first instance must be a reasonable one. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941); *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Nuisance is generally applied to that class of wrongs that arise from the unreasonable, unwarranted or unlawful use of property. *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (1980).

When one acting solely from malevolent motives does injury to his neighbor, to call such conduct the exercise of an absolute legal right is a perversion of terms. No statute or other rule of law in this state that confers upon an individual a right to maliciously injure another, regardless of what method may be employed to inflict such injury. On the other hand, everyone is entitled to the protection of the law against invasions of his rights by others. The use of one's own property for the sole purpose of injuring another is not a right that a good citizen would desire nor one that a bad citizen should have. *Hornsby v. Smith*, 191 Ga. 491, 13 S.E.2d 20 (1941).

Fact that defendant's predecessor condemned a part of the plaintiff's land for railroad purposes, and used the part so condemned did not authorize it or its successor in title to maintain a nuisance to the damage of the plaintiff's other near-by prop-

erty. *Goble v. Louisville & N.R.R.*, 187 Ga. 243, 200 S.E. 259 (1938).

**Nuisance and trespass distinguished.** — A nuisance is an indirect tort, while a trespass usually is a direct infringement of one's property rights. The distinction between trespass and nuisance consists in the former being a direct infringement of one's right of property, while in the latter the infringement is the result of an act which is not wrongful in itself, but only in the consequences which may flow from it. In the one case the injury is immediate, in the other it is consequential, and generally results from the commission of an act beyond the limits of the property affected. *Groover v. Hightower*, 59 Ga. App. 491, 1 S.E.2d 446 (1939); *Cannon v. City of Macon*, 81 Ga. App. 310, 58 S.E.2d 563 (1950), later appeal, 89 Ga. App. 484, 79 S.E.2d 816 (1954).

**Violation of criminal law not necessarily a nuisance.** — A violation of criminal law such as the pursuit of a business on Sunday will not be enjoined on the petition of an individual unless it amounts to a nuisance. *Warren Co. v. Dickson*, 185 Ga. 481, 195 S.E. 568 (1938).

**Cited in** *Center & Treadwell v. Davis*, 39 Ga. 210 (1869); *Rounsaville v. Kohlheim*, 68 Ga. 668 (1882); *Butler v. Mayor of Thomasville*, 74 Ga. 570 (1885); *Ison v. Manley*, 76 Ga. 804 (1886); *Horton v. Fulton*, 130 Ga. 466, 60 S.E. 1059 (1908); *Williams v. Southern Ry.*, 140 Ga. 713, 79 S.E. 850 (1913); *Tate v. Mull*, 147 Ga. 195, 93 S.E. 212 (1917); *Sanders v. City of Atlanta*, 147 Ga. 819, 95 S.E. 695 (1918); *Pitner v. Shugart Bros.*, 150 Ga. 340, 103 S.E. 791 (1920); *Morrison v. Slappey*, 153 Ga. 724, 113 S.E. 82 (1922); *Town of Rentz v. Roach*, 154 Ga. 491, 115 S.E. 94 (1922); *Harris v. Sutton*, 168 Ga. 565, 148 S.E. 403 (1929); *Jones v. City of Atlanta*, 40 Ga. App. 300, 149 S.E. 305 (1929); *Atlantic Ref. Co. v. Farrar*, 171 Ga. 371, 155 S.E. 327 (1930); *Thomason v. Sammon*, 174 Ga. 751, 164 S.E. 45 (1932); *Hall v. Moffett*, 177 Ga. 300, 170 S.E. 192 (1933); *Wingate v. City of Doerun*, 177 Ga. 373, 170 S.E. 226 (1933); *Georgia Power Co. v. Moore*, 47 Ga. App. 411, 170 S.E. 520 (1933); *Pittard v. Summerour*, 181 Ga. 349, 182 S.E. 20 (1935); *Perkerson v. Mayor of Greenville*, 51 Ga. App. 240, 180 S.E. 22 (1935); *Dickson v. Warren Co.*, 183 Ga. 746, 189 S.E. 839 (1937); *Warren v. Georgia Power Co.*, 58 Ga. App. 9, 197 S.E. 338 (1938); *Poole v. Arnold*, 187 Ga. 734, 2



S.E.2d 83 (1939); *Simpson v. Blanchard*, 73 Ga. App. 843, 38 S.E.2d 634 (1946); *Leonard v. State ex rel. Lanier*, 204 Ga. 465, 50 S.E.2d 212 (1948); *Lankford v. Dockery*, 85 Ga. App. 86, 67 S.E.2d 800 (1951); *Jordan v. Orr*, 209 Ga. 161, 71 S.E.2d 206 (1952); *Seckinger v. City of Atlanta*, 213 Ga. 566, 100 S.E.2d 192 (1957); *Barrow v. Georgia Lightweight Aggregate Co.*, 103 Ga. App. 704, 120 S.E.2d 636 (1961); *Southeastern Liquid Fertilizer Co. v. Chapman*, 103 Ga. App. 773, 120 S.E.2d 651 (1961); *Isley v. Little*, 219 Ga. 23, 131 S.E.2d 623 (1963); *Dumus v. Renfro*, 220 Ga. 33, 136 S.E.2d 753 (1964); *Cronic v. State*, 222 Ga. 623, 151 S.E.2d 448 (1966); *Town of Fort Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968); *Whitehead v. Hasty*, 235 Ga. App. 331, 219 S.E.2d 443 (1975); *City of Atlanta v. Owen*, 248 Ga. 299, 282 S.E.2d 906 (1981); *Columbus v. Smith*, 170 Ga. App. 276, 316 S.E.2d 761 (1984); *Life for God's Stray Animals, Inc. v. New N. Rockdale County Homeowners Ass'n*, 253 Ga. 551, 322 S.E.2d 239 (1984).

#### **Power of Municipality to Create Nuisance**

**Municipality under a legal duty to create no nuisances.** Insofar as the language in a requested charge by a defendant reflects this, it is redundant. Insofar as it states otherwise, it is simply wrong. *Banks v. City of Brunswick*, 529 F. Supp. 695 (S.D. Ga. 1981), *aff'd*, 667 F.2d 97 (11th Cir. 1982).

**Creating nuisance under guise of performing governmental function.** — While it is true that a municipal corporation is not liable for its acts of negligence in discharging a governmental function, yet a municipal corporation cannot, under the guise of performing a governmental function, create a nuisance dangerous to life or health. *Mayor of Savannah v. Palmerio*, 242 Ga. 419, 249 S.E.2d 224 (1978).

**Effect of power to grade streets and establish drainage system.** — A general grant of power to grade streets and to establish in connection therewith a system of drainage does not carry with it any right on the part of the municipality to create and maintain a nuisance by causing surface water to be discharged upon the premises of a private citizen; and he may, when such a thing has been done, maintain against the city an action to recover the damages sustained in consequence thereof. *Thrasher v. City of*

*Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

**Effect of power to construct sewer and drain system.** — Power to construct a system of sewers and drains does not authorize the municipal corporation to create a nuisance. In such a case the city cannot escape liability on the ground that it is engaged in the performance of a governmental function. *Cannon v. City of Macon*, 81 Ga. App. 310, 58 S.E.2d 563 (1950), later appeal, 89 Ga. App. 484, 79 S.E.2d 816 (1954); *City of Rome v. Turk*, 235 Ga. 223, 219 S.E.2d 97 (1975).

**County's failure to maintain a culvert.** — Failure of a county to adequately maintain a culvert, resulting in property damage from flooding, was a nuisance when the county clearly knew of the flooding problems, and knew that construction developments upstream, which it had approved, contributed to the flooding. *Fulton County v. Wheaton*, 252 Ga. 49, 310 S.E.2d 910 (1984), overruled on other grounds, *DeKalb County v. Orwig*, 261 Ga. 137, 402 S.E.2d 513 (1991).

**Actions against municipality.** — An action sounding in tort may be brought against a municipal corporation for the creation or maintenance of a nuisance, without reference to any question of negligence, where danger to health or life is involved; and an action sounding in tort may be brought against a municipal corporation for the creation or maintenance of a nuisance where the defendant is negligent, even though the act was authorized to be done. *Ingram v. City of Acworth*, 90 Ga. App. 719, 84 S.E.2d 99 (1954).

Petition set out a cause of action for damages for the maintenance by the defendant of a sewage disposal plant in such manner as to cause a continuing nuisance dangerous to life and health, and was not subject to general demurrer on the ground that the city was at the time engaged in a governmental function. *Ingram v. City of Acworth*, 90 Ga. App. 719, 84 S.E.2d 99 (1954).

Where petition showed an improper maintenance of a sewerage disposal plant, with resulting injury to health and property damage, the fact that the alleged improper maintenance resulted from negligent acts on the part of defendant city did not create a misjoinder of actions, but only strengthened the action as laid on the theory of a continu-

### Power of Municipality to Create Nuisance (Cont'd)

ing nuisance. *Ingram v. City of Acworth*, 90 Ga. App. 719, 84 S.E.2d 99 (1954).

### Classes of Nuisances

#### 1. In General

**Classification dependent upon particular facts.** — Which particular things may, and which may not, be condemned as a nuisance, usually stand or fall upon their own particular facts. *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944).

**Classes of nuisances.** — There are three classes of nuisances: (1) nuisances per se, such as the obstruction of a stream; (2) nuisances dependent on circumstances, such as the conduct of a lawful business in certain surroundings. *Simpson v. DuPont Powder Co.*, 143 Ga. 465, 85 S.E. 344 (1915); and (3) continuing nuisances which are complements of the other two, as distinguished from a permanent nuisance. *City Council v. Lombard*, 101 Ga. 724, 28 S.E. 994 (1897).

#### 2. Nuisance Per Se

**Definition.** — A nuisance at law or a nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstance, regardless of location or surroundings. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941); *Gatewood v. Hansford*, 75 Ga. App. 567, 44 S.E.2d 126 (1947).

**Structures lawfully erected.** — Nothing that is lawful in its erection can be a nuisance per se. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

**Injunction.** — Equity will not enjoin, as a nuisance per se, an act, occupation, or structure which is not a nuisance at all times or under all circumstances, regardless of location or surroundings. *Asphalt Prods. Co. v. Beard*, 189 Ga. 610, 7 S.E.2d 172 (1940); *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944).

#### 3. Nuisance in Fact or Per Accidens

**Definition.** — Nuisances in fact or per accidens are those which become nuisances by reason of circumstances and surround-

ings. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

The larger class of nuisances are termed nuisances in fact or nuisances per accidens, and consists of those acts, occupations, or structures which are not nuisances per se but may become nuisances by reason of the circumstances or the location and surroundings. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941); *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

**Lawful enterprises.** — The larger class of nuisances are termed nuisances in fact or nuisances per accidens. *Bacon v. Walker*, 77 Ga. 336 (1886); *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

Lawful business cannot be a nuisance per se, although, because of surrounding places or circumstances, or because of the manner in which it is conducted, it may become a nuisance. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

A business may be a nuisance either by reason of its location or by reason of the improper or negligent manner in which it is conducted. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941).

A lawful business may, by reason of its location in a residential area, cause hurt, inconvenience and damage to those residing in the vicinity and become a nuisance per accidens by reason of circumstances and surroundings. *Camp v. Warrington*, 227 Ga. 674, 182 S.E.2d 419 (1971).

That which the law authorizes to be done, if done as the law authorizes, cannot be a nuisance. *City of Atlanta v. Due*, 42 Ga. App. 797, 157 S.E. 256 (1931); *Asphalt Prods. Co. v. Beard*, 189 Ga. 610, 7 S.E.2d 172 (1940); *Mayor of Savannah v. Palmerio*, 242 Ga. 419, 249 S.E.2d 224 (1978).

That which the law authorizes to be done, if done as the law authorizes, is not a nuisance. If a public project is legislatively sanctioned it cannot be adjudged a nuisance. *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (1980).

**Improper execution of authorized act.** — This section in defining a nuisance, and in saying that the lawfulness of the act does not keep it from being a nuisance, does not mean that an act may amount to a nuisance where it is authorized by law and then is executed in accordance with the judgment or conclusion reached by the municipal



authorities in the exercise of the governmental function; but the true interpretation of this section is that an act which the law authorizes to be done may result in an actionable nuisance only where there is negligence or error in the execution of the plans and specifications adopted or prescribed by the governing authority. *City of Atlanta v. Due*, 42 Ga. App. 797, 157 S.E. 256 (1931); *Southland Coffee Co. v. City of Macon*, 60 Ga. App. 253, 3 S.E.2d 739 (1939).

Where the act itself is legal, it only becomes a nuisance when conducted in an illegal manner to the hurt, inconvenience, or damage of another. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938); *Southland Coffee Co. v. City of Macon*, 60 Ga. App. 253, 3 S.E.2d 739 (1939); *Lawrence v. City of La Grange*, 63 Ga. App. 587, 11 S.E.2d 696 (1940).

Where if one does an act, of itself lawful, which being done in a particular place, necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act where it will not be injurious or offensive. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941); *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944); *Miller v. Coleman*, 213 Ga. 125, 97 S.E.2d 313 (1957).

**Importance of location of enterprise.** — A nuisance may consist merely of the right thing in the wrong place, regardless of other circumstances. *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944).

A thing that is lawful and proper in one locality may be a nuisance in another; in other words, a nuisance may consist merely of the right thing in the wrong place, regardless of other circumstances. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Though an act or thing be lawful, if, by reason of its location in a particular place it damages the property of another it is a nuisance. *Gatewood v. Hansford*, 75 Ga. App. 367, 44 S.E.2d 126 (1947).

**Injunction.** — Equity will not enjoin, as a nuisance per accidens, an act, business, occupation, or structure, which, not being a nuisance per se, does not become a nuisance by reason of the particular circumstances of its operation or the location and surroundings, as by some improper manner of operation or improper connected acts. *Asphalt*

*Prods. Co. v. Beard*, 189 Ga. 610, 7 S.E.2d 172 (1940); *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941); *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944).

#### 4. Continuing Nuisance

**Definition.** — A continuing nuisance does not necessarily mean a constant and unceasing nuisance, but a nuisance which occurs so often, and is so unnecessarily an incident of the use of property complained of, that it can be fairly said to be continuous, although not constant or unceasing. *Farley v. Gate City Gaslight Co.*, 105 Ga. 323, 31 S.E. 193 (1898); *Keener v. Addis*, 61 Ga. App. 40, 5 S.E.2d 695 (1939).

**Repetitive harm or inconvenience as nuisance.** — Concept of nuisance involves repetition or condition causing hurt, inconvenience or injury. The whole idea of nuisance is that of either a continuous or regularly repetitious act or condition which causes the hurt, inconvenience or injury. A single isolated occurrence or act, which if regularly repeated would constitute a nuisance, is not a nuisance, until it is regularly repeated. *Leake v. City of Atlanta*, 146 Ga. App. 57, 245 S.E.2d 338 (1978), rev'd on other grounds, 243 Ga. 20, 252 S.E.2d 450 (1979).

**Continuance gives rise to new cause of action.** — Every continuance of a nuisance which is not permanent, and which could and should be abated, is a fresh nuisance for which a new action will lie. *Goble v. Louisville & N.R.R.*, 187 Ga. 243, 200 S.E. 259 (1938).

Where one creates a nuisance, and permits it to remain, it is treated as a continuing wrong, and as giving rise, over and over again, to causes of action. But the principle upon which one is charged as a continuing wrongdoer is that he has a legal right, and is under a legal duty, to terminate the cause of the injury. *Keener v. Addis*, 61 Ga. App. 40, 5 S.E.2d 695 (1939).

A continuing nuisance gives a new cause of action for each day of its continued maintenance, and in such a case in order to avoid a multiplicity of suits a court of equity will entertain jurisdiction to enjoin the nuisance and have it abated. *Harbuck v. Richland Box Co.*, 204 Ga. 352, 49 S.E.2d 883 (1948), later appeal, 207 Ga. 537, 63 S.E.2d 333 (1951).

Plaintiff's right to equitable relief was not

**Classes of Nuisances (Cont'd)****4. Continuing Nuisance (Cont'd)**

barred by the statute of limitations on grounds that the nuisance complained of had existed for a period of more than four years prior to the institution of litigation, since where there is a continuing nuisance, a new cause of action arises daily and a court of equity takes jurisdiction in such a case to avoid a multiplicity of suits. *Scott v. Dudley*, 214 Ga. 565, 105 S.E.2d 752 (1958).

Where the nuisance lay in the continuing contamination, not in the leaks which originally gave rise to it, damage was not complete and suit was not barred by the applicable four-year limitations period. *Hoffman v. Atlanta Gas Light Co.*, 206 Ga. App. 727, 426 S.E.2d 387 (1992).

**Original nuisance always precedes continuing nuisance.** — If there was no original nuisance, there could be no continuing nuisance. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938); *Davis v. Beard*, 202 Ga. App. 784, 415 S.E.2d 522 (1992).

**Duty of wrongdoer to terminate continuing nuisance.** — Where one creates a nuisance, and permits it to remain, it is treated as a continuing wrong, and as giving rise, over and over again, to causes of action. But the principle upon which one is charged as a continuing wrongdoer is that he has a legal right, and is under a legal duty, to terminate the cause of the injury. *Keener v. Addis*, 61 Ga. App. 40, 5 S.E.2d 695 (1939).

**Prescription does not run in favor of a continuing nuisance.** *Gabbett v. City of Atlanta*, 137 Ga. 180, 73 S.E. 372 (1911).

**Equity jurisdiction of continuing nuisance.** — If a nuisance is a continuing one as described in this section, a court of equity will take jurisdiction to enjoin such a nuisance. *Ford v. Crawford*, 240 Ga. 612, 241 S.E.2d 829 (1978).

**When plaintiff entitled to equitable relief.** — If alleged conduct constitutes a continuing nuisance under this section, the plaintiff is entitled to equitable relief. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

**Accrual right of action.** — A nuisance, permanent and continuing in its character, the destruction or damage being at once complete upon the completion of the act by which the nuisance is created, gives but one

right of action, which accrues immediately upon the creation of the nuisance, and against which the statute of limitations begins, from that time, to run. *City of La Fayette v. Hegwood*, 52 Ga. App. 168, 182 S.E. 860 (1935).

**Manner of Proof**

**Contents of complaint.** — In a nuisance action the complainant must show the existence of the nuisance complained of, that he has suffered injury, and that the injury complained of was caused by the alleged nuisance. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941).

**Nuisance per accidens.** — See *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

A petition alleging that, at a place of business located on a main thoroughfare, outside the corporate limits of any municipality, beer and wine are being sold, a juke box operated, both day and night, making a loud noise which disturbs and hinders the residents of the neighborhood from sleep, that drunk people congregate and come out of the place cursing, fighting, and making undue noise, and many people of disreputable character gather, and that beer is sold there on Sunday in violation of law, is sufficient to charge the existence of an abatable public nuisance, and therefore stated a cause of action and one which the solicitor-general (now district attorney) could bring proceedings to abate. *Davis v. State ex rel. Lanham*, 199 Ga. 839, 35 S.E.2d 458 (1945) (decided, in part, under former Code 1933, § 26-6103).

The information of a district attorney filed on the application of a citizen — to the effect that the defendant knowingly maintained and used a building for the purposes of gaming and had in the building a certain paper card, dice and other contents, which should also be declared to be a nuisance — were sufficient, as against the general and special grounds of the defendant's demurrer, to set forth a cause of action, to abate the place as a common nuisance. *Thornton v. Forehand*, 211 Ga. 658, 87 S.E.2d 865 (1955).

**Indirect damage of aesthetic value.** — Allegations that the appellees' actions taken on their own property have indirectly damaged the aesthetic value of the plaintiff's fail



to state a cause of action under this section. *Jillson v. Barton*, 139 Ga. App. 767, 229 S.E.2d 476 (1975).

Where the allegations of petition could be construed as sufficient to show creation of a public nuisance, there being no allegations that the abatement of the nuisance in the manner authorized by law would not afford the petitioners adequate relief, writ of mandamus would not lie. *State Hwy. Dep't v. Reed*, 211 Ga. 197, 84 S.E.2d 561 (1954).

**Insufficient allegations.** — A petition fell short of describing a public nuisance when there was no allegation that from the points where the sewage was deposited by the defendant city the streams flowed through the lands owned by anyone other than the plaintiff, or that anyone other than he was damaged thereby. *Vickers v. City of Fitzgerald*, 216 Ga. 476, 117 S.E.2d 316 (1960), overruled on other grounds, *City of Chamblee v. Maxwell*, 264 Ga. 635, 452 S.E.2d 488 (1994).

Allegations of petition seeking to enjoin an alleged nuisance in operating asphalt and cement-mixing and manufacturing plant as to the spilling of concrete and asphalt in a public street and its effect on persons walking along the street related to a public nuisance, and stating no special damage, showed no cause of action. *Asphalt Prods. Co. v. Beard*, 189 Ga. 610, 7 S.E.2d 172 (1940).

**Test for nuisance.** — The test of whether an act or thing complained of is a nuisance is whether it would be offensive to persons of ordinary feelings and sensibilities, and not those of fastidious taste or temperament. *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944).

In the determination of whether a given state of facts discloses a nuisance, the general effect of the condition shown on an ordinary person, rather than one of abnormal sensibilities and feelings, is the proper consideration. *Dorsett v. Nunis*, 191 Ga. 559, 13 S.E.2d 371 (1941).

The determining factor in an alleged nuisance is not its effect upon persons who are invalids, afflicted with disease, bodily ill, or abnormal physical conditions, or who are of nervous temperament, or peculiarly sensitive to annoyances or disturbances of the character complained of. *Warren Co. v. Dickson*, 185 Ga. 481, 195 S.E. 568 (1938).

**Business as nuisance.** — To make a business a nuisance it must be such to people of

ordinary nature or condition; it is not sufficient if it be simply offensive to delicate and sensitive organizations. *Ruff v. Phillips*, 50 Ga. 130 (1873).

**Threat of inconvenience.** — Mere apprehension of inconveniences arising from a filling-station in course of construction, the same being for a lawful business use, is not sufficient to authorize an injunction. *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S.E. 1126 (1910); *Standard Oil Co. v. Kahn*, 165 Ga. 575, 141 S.E. 643 (1928).

**Negligence not required.** — Negligence is not a necessary ingredient of a cause of action growing out of a nuisance. *Cannon v. City of Macon*, 81 Ga. App. 310, 58 S.E.2d 563 (1950), later appeal, 89 Ga. App. 484, 79 S.E.2d 816 (1954).

**Comfortable enjoyment of premises must be sensibly diminished.** — In a nuisance action the occupants of a dwelling house must show that the comfortable enjoyment of the premises has been sensibly diminished, either by actual, tangible injury to the property itself, or by the promotion of such physical discomfort as detracts sensibly from the ordinary enjoyment of life. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941); *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

**Jury determination of public nuisance.** — Whether or not the acts of the defendant constituted a public nuisance, as contended by the plaintiff and denied by the defendant, is an issue for the jury to determine. *Scott v. Reynolds*, 70 Ga. App. 545, 29 S.E.2d 88 (1944).

While it is no longer required that the plaintiff in a nuisance case show, as he had to do at common law, a freehold interest in the property affected by the nuisance, and while he no longer need show damage to the realty itself, he must still show that the condition is injurious by reason of its relationship to his home or property in the neighborhood where it is located, or else that it is injurious by reason of its constituting an obstruction to streets or sidewalks and like places used by the public generally for passage, which obstructions were at common law regarded as public nuisances because they interfered with the public right of passage. *Stanley v. City of Macon*, 95 Ga. App. 108, 97 S.E.2d 330 (1957).

### Damages

**Nominal damages.** — Where a nuisance is shown to exist, the law imports damages for an injury to the right, and at least nominal damages may be recovered to protect the right. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941).

**Damages by public nuisance.** — A private citizen specially damaged by a public nuisance may proceed in his own name and behalf to have the same abated. *Savannah, F. & W. Ry. v. Gill*, 118 Ga. 737, 45 S.E. 623 (1903).

**Manner of alleging damages.** — A general allegation of damage is sufficient to entitle a recovery of all damages that are the natural consequence of the nuisance; but where special damages are alleged, the defendant should be apprised of the items thereof. *Exley v. Southern Cotton Oil Co.*, 151 F. 101 (S.D. Ga. 1907).

**Recovery of damages.** — An owner-occupant is entitled to recover damages for annoyance and discomfort temporarily depriving him of the unrestricted use and full enjoyment of his premises, in addition to damages for permanent injury to the freehold and for pain and suffering as a result of the maintenance of a nuisance. *Shepherd Constr. Co. v. Vaughn*, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

If permanent injury is sustained as the result of the maintenance of a nuisance, then the owner of the property damaged is entitled to compensation for such permanent injury, whether the nuisance is abated or abatable. *Shepherd Constr. Co. v. Vaughn*, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

Damages for depreciation in the market value of property are appropriate in a suit against a municipality for the taking or damaging of property for public use and also in a suit for a permanent and continuing nuisance created by the municipality, recovery of such damages must be had within four years from the date of the original injury. *City of La Fayette v. Hegwood*, 52 Ga. App. 168, 182 S.E. 860 (1935).

In the case of a private abatable nuisance, such as the operation of an asphalt mixing plant, the plaintiff is entitled to recover for any direct damage to his person or to his property resulting from the nuisance, accruing within the statute of limitations and up to the filing of the petition. *Shepherd*

*Constr. Co. v. Vaughn*, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

The owner of a dwelling house which he himself occupies as a home is entitled to just compensation for the annoyance and discomfort occasioned by the maintenance, by another, of a nuisance on adjacent premises. *Shepherd Constr. Co. v. Vaughn*, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

For damages for permanent injury to property for an unabatable nuisance, there can be but one recovery. "A nuisance, permanent and continuing in its character, the destruction or damage being at once complete upon completion of the act by which the nuisance is created, gives but one right of action, which accrues immediately upon the creation of the nuisance ... Where the original nuisance to land is of a permanent character so that the damages inflicted thereby are permanent, a recovery not only may, but must, be had for the entire damages in one action; and such damages accrue from the time the nuisance is created, and from that time the statute of limitations begins to run." *Price v. Georgia Indus. Realty Co.*, 132 Ga. App. 107, 207 S.E.2d 556 (1974).

There can be no recovery for damage flowing merely from an improper or defective or negligent construction or maintenance of a public improvement which results in an abatable continuing nuisance on the theory that plaintiff's property has been appropriated by its erection and maintenance. *Rhines v. Commissioners of Chatham County*, 50 Ga. App. 844, 179 S.E. 140 (1935).

In cases of nuisances which cause permanent injury to land, the ordinary rule is that the measure of damages is the depreciation in the market value; in regard to nuisances which are of a nonpermanent, abatable, or temporary nature, the depreciation in the usable or rental value ordinarily furnishes the measure. But, under some circumstances, there may also be a recovery for special damages. *Ward v. Southern Brighton Mills*, 45 Ga. App. 262, 164 S.E. 214 (1932).

**Apportionment of damages.** — A court of equity, acquiring jurisdiction for the purpose of abating a nuisance, will also, upon proper averments, extend such jurisdiction to the ascertainment and determination of the damages suffered by reason of the nuisance,



and in such event a court of equity may severally apportion damages among the defendants for their proportionate contribution to the injury. *Vaughn v. Burnette*, 211 Ga. 206, 84 S.E.2d 568 (1954).

### Illustrative Cases

**Airplanes.** — Where the evidence showed that at least 75 flights were made over the plaintiff's school building daily at altitudes of from 50 to 75 feet, just over the top of her trees, that the danger necessarily created thereby to the life and safety of those occupying her premises, the noise and vibration caused thereby, and the distracting effect on her students made further operation of her school impracticable, and that by such flights the right to enjoy freely the use of her property has been substantially lessened, a continuing nuisance was established which equity would enjoin. *Scott v. Dudley*, 214 Ga. 565, 105 S.E.2d 752 (1958).

**Air pollution.** — The pollution of the air, actually necessary to the reasonable enjoyment of life and indispensable to the progress of society, is not actionable; but the right must not be exercised in an unreasonable manner so as to inflict injury upon another unnecessarily. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

**Asphalt mixing plant.** — While the operation of an asphalt mixing plant is not a nuisance per se, it may become a nuisance in fact or a nuisance per accidens by reason of the circumstances or the location and surroundings. *Sam Finley, Inc. v. Russell*, 75 Ga. App. 112, 42 S.E.2d 452 (1947).

**Asphalt-manufacturing and cement-mixing plant.** — The operation of an asphalt-manufacturing and cement-mixing plant is not a nuisance per se. Nor does it become a nuisance per accidens, if it is conducted in a manufacturing section of a city, merely because it is operated by coal or some fuel discharging obnoxious smoke and cinders, or releases dust, or is accompanied by loud rattling noises during the day and night, and is within 200 feet of a residence, where it is not shown that such operation is in a residence neighborhood, or that the manner of operation is unusual in a business of this character, or unnecessary and avoidable. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941).

**Recreational use of baseball park.** — The playing of ordinary games of baseball, or the operation of a park for such games, in a lawful, decent, and orderly manner, and accompanied only by the usual cheers and noise of spectators, where these contests are harmlessly played and enjoyed, is not a nuisance per se. Such games or pursuits, may however, become a nuisance per accidens, where there is indecent, disorderly, or improper conduct of the players or spectators; or where, in a residential community, there is accompanying noise, which is excessive and unreasonable, or which recurs at unusual and unreasonable hours of the night, so as to prevent the sleep of ordinary, normal, reasonable persons of the neighborhood. *Warren Co. v. Dickson*, 185 Ga. 481, 195 S.E. 568 (1938).

**Billboards.** — A billboard erected by defendants on their own land, which is not otherwise a nuisance, does not become one merely because it is erected maliciously or from spite or ill will, where it serves a useful purpose. *Campbell v. Hammock*, 212 Ga. 90, 90 S.E.2d 415 (1955).

**Slaughterhouses and similar enterprises.** — Certain businesses or structures, such as slaughterhouses and certain foul-smelling factories, are so offensive to the senses that they must be removed from the limits of cities and towns, and even from the neighborhood of family residences. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

**Business solicitation of private home.** — To arbitrarily declare, without qualification, that every solicitor who goes to a private home to try to conduct an otherwise perfectly legal business is a nuisance and subject to fine or imprisonment is an unreasonable interference with his normal legal rights, and is without due process of law. *De Berry v. City of La Grange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

**Church in residential section.** — A church though erected in a residential section is not per se a nuisance. *Dorsett v. Nunis*, 191 Ga. 559, 13 S.E.2d 371 (1941).

**Creating and spreading dust.** — The creation and spreading of dust in such large and unusual quantities as unreasonably to contaminate the atmosphere and endanger the health and lives of the citizens is not within the actual or implied authority of an

**Illustrative Cases (Cont'd)**

airport franchise, and those responsible therefor, despite any immunity or limited liability, may be held to full accountability for the maintenance of a nuisance. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

The spread of dust upon the property of another in excessive and unreasonable quantities may amount to a physical invasion of his property rights. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

Dust is a physical substance, or an aggregation of substances, gathered from the earth. It may contain impurities and result directly in disease or physical injury; one cannot be forced to endure it from the negligence of another even though the business from which it springs may be expressly authorized by law. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

**Fair occupying street.** — Ferris wheels and other devices for amusement, which fair a company of the state militia is permitted to station on the street for a week, is a public nuisance and a court of equity has jurisdiction, at the instance of the solicitor-general (now district attorney), to restrain it by injunction. *City Council v. Reynolds*, 122 Ga. 754, 50 S.E. 998, 106 Am. St. R. 147, 69 L.R.A. 564 (1905).

**Filling station.** — A filling-station is not per se a nuisance. *Standard Oil Co. v. Kahn*, 165 Ga. 375, 141 S.E. 643 (1928).

Injuries and inconveniences to persons residing near filling station, such as noises, etc., which result ordinarily and from necessity in the conduct of their business of repairing cars, trucks, and tires, are not to be classed as nuisances. *Wilson v. Evans Hotel Co.*, 188 Ga. 498, 4 S.E.2d 155 (1939).

**Gaming house.** — The maintenance of a gaming house or a gaming place is a public nuisance. *Thornton v. Forehand*, 211 Ga. 658, 87 S.E.2d 865 (1955).

**Veterinary hospital.** — The operation of a dog and cat hospital is a lawful enterprise and is not a nuisance per se, and cannot be enjoined unless it becomes a nuisance by reason of the particular circumstances of its improper operation or improper connected acts. *Powell v. Garmany*, 208 Ga. 350, 67 S.E.2d 781 (1951).

**Injury to health.** — All injury to health is special, and necessarily limited in its effect to

the individual affected, and is, in its nature, irreparable. It matters not that others within the sphere of the operation of the nuisance, whether public or private, may be affected likewise. *Hunnicut v. Eaton*, 184 Ga. 485, 191 S.E. 919 (1937).

**Livery stable.** — A livery stable in a town is not necessarily a nuisance in itself; and therefore a court of equity has no jurisdiction to restrain by injunction either the completion of a building because intended for that purpose, or its appropriation to the use intended. *Thomson v. Sammon*, 174 Ga. 751, 164 S.E. 45 (1932).

**Hog and chicken feed manufacturing plant.** — The mere erection of a plant for the manufacture of hog and chicken feed from the entrails from poultry and other animals is not without more a nuisance per se, and the allegations of the petition do not show it to be such. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

**Noise.** — Where noise accompanies an otherwise lawful business or pursuit, the question whether such noise is a nuisance depends upon the nature of the locality as a residence community or otherwise, on the degree of intensity and disagreeableness of the sounds, on their times and frequency, and in all cases, under the preceding rules, on their effect, not upon peculiar and unusual individuals, but upon the ordinary, normal, reasonable persons of the locality. *Warren Co. v. Dickson*, 185 Ga. 481, 195 S.E. 568 (1938).

**Noxious trade or business as nuisance.** — To constitute a nuisance, it is not necessary that a noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944); *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946); *City of Macon v. Cannon*, 89 Ga. App. 484, 79 S.E.2d 816 (1954); *Miller v. Coleman*, 213 Ga. 125, 97 S.E.2d 313 (1957).

**Obstructing streets.** — The proper authorities may entertain an application to abate a nuisance caused by the obstruction of a city street or public alley. *Carlisle v. Wilson*, 110 Ga. 860, 36 S.E. 54 (1900); *Robins v. McGehee*, 127 Ga. 431, 56 S.E. 461



(1907); *Hendricks v. Jackson*, 143 Ga. 106, 84 S.E. 440 (1915); *Hendricks v. Carter*, 21 Ga. App. 527, 94 S.E. 807 (1918).

Action to abate nuisance, caused by obstruction of a city street or public alley, may be maintained by anyone whose property will be injuriously affected. *Coker v. Atlanta, K. & N. Ry.*, 123 Ga. 483, 51 S.E. 481 (1905).

Where, in an equitable petition, the only prayer for specific relief was that the defendant be temporarily restrained and permanently enjoined from maintaining a barricade or obstruction, which it had placed in a public street, or that it be required to abate the alleged nuisance, and the barricade or obstruction was fully completed and existing when the suit was instituted, it was erroneous to overrule a general demurrer (now motion to dismiss) to the petition as amended, which pointed out that the plaintiff was not entitled to the relief prayed for since it has an adequate and a complete remedy at law; a party who complains only of a completed existing obstruction in a public street must pursue the remedy which the statute affords him. *City of East Point v. Henry Chanin Corp.*, 210 Ga. 628, 81 S.E.2d 812 (1954).

If a street or alley was a public street or alley, the obstruction or encroachment upon it by an adjoining landowner would constitute a public nuisance subject to abatement on petition of a user of the alley if special injury were shown to have occurred to the user by the obstruction. *Henderson v. Ezzard*, 75 Ga. App. 724, 44 S.E.2d 397 (1947).

Where there is actual obstruction of a portion of a road intended for travel, actual interference or inconvenience is immaterial. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

**Permanent obstruction of city streets.** — The right to the use of the streets of a city is in the public, and any permanent obstruction thereof which materially impedes travel is a nuisance per se. *Williamson v. Souter*, 172 Ga. 364, 157 S.E. 463 (1931).

Any permanent structure in a road which materially interferes with travel is a nuisance per se, and any obstruction permanent in nature or continuously maintained, which interferes with the free use of the road by the public, is a public nuisance, and it is immaterial that space may be left on either side of the obstruction for the passage of the public.

The public has the right to the unobstructed use of the whole road as it was acquired by the county or city. *Harbuck v. Richland Box Co.*, 204 Ga. 352, 49 S.E.2d 883 (1948), later appeal, 207 Ga. 537, 63 S.E.2d 333 (1951).

**Permanent structures which do not interfere with travel.** — Permanent structures which do not interfere with travel, and which are erected for public purposes, such as telegraph and telephone poles, and the like, are permissible; it is not every use by an individual of a street or highway which constitutes a public nuisance. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

Any permanent structure in a public road which materially interferes with travel therein is a nuisance per se. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

If a street or alley was a public street or alley, the obstruction or encroachment upon it by an adjoining landowner would constitute a public nuisance subject to abatement on petition of a user of the alley if special injury were shown to have occurred to the user by the obstruction. *Henderson v. Ezzard*, 75 Ga. App. 724, 44 S.E.2d 397 (1947).

Where the evidence was uncontradicted that an alley had been used by the public in general for more than 20 years prior to its obstruction 30 years prior to trial by the defendant, a finding was demanded that the public had acquired a prescriptive right to the free and unobstructed use of the alley and that it was a public alley, and since prescription does not run against a municipality as to land held for the benefit of the public, such as a public alley, the obstruction must be removed. *Henderson v. Ezzard*, 75 Ga. App. 724, 44 S.E.2d 397 (1947).

**Pavement broken by ordinary use.** — A private corporation is not liable to a person injured by the crumbling of the pavement on a sidewalk which was caused by ordinary wear and tear of its trucks when crossing to enter one of its alleys. *McAfee v. Atlantic Ice & Coal Corp.*, 26 Ga. App. 25, 105 S.E. 631 (1920).

**State prison labor on county projects.** — Utilizing state prison labor on county projects is not, by itself, "nuisance" for which the county would be liable; the county could not be liable for a nuisance unless the

**Illustrative Cases** (Cont'd)

act complained of amounted to a taking for public purposes. *West v. Chatham County*, 177 Ga. App. 417, 339 S.E.2d 390 (1985).

**Public institution.** — The fact alone that a proposed clinic is to be operated as a public institution, would not necessarily prevent it from being a nuisance if located in a residential section. *Benton v. Pittard*, 197 Ga. 843, 31 S.E.2d 6 (1944).

**"Purpresture."** — A purpresture as defined at common law, and recognized in this and other states, is when one encroaches and makes that serviceable to himself which belongs to many. Thus, any encroachment upon a public street or highway is a purpresture; and if the public use is impeded or rendered less commodious, such encroachment is generally not only a purpresture, but also technically a public nuisance, regardless of the degree of interference with the common enjoyment. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

It is not true that every purpresture is a public nuisance. It may or may not be such, according to the particular facts. Although the two may coexist, either may exist without the other. The rule both in reason and by authority is that, unless the public sustain or may sustain some degree of inconvenience or annoyance in the use of a public highway or street or other public property, there is no public nuisance. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

While there may be language in some decisions indicating that a purpresture is always a public nuisance, the terms are not synonymous. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

**Railroads or other quasi-public facilities.** — Injuries and inconveniences to persons residing near railroads or other quasi-public facilities from noises of locomotives, rumbling of cars, vibrations produced thereby, and smoke, cinders, and soot, and the like, which result from the ordinary and necessary, and therefore proper, use and conduct of such works, are not nuisances, but are the necessary concomitants of the franchises granted. *Central of Ga. R.R. v. Collins*, 232 Ga. 790, 209 S.E.2d 1 (1974).

If the relocation of the defendant's track was done under lawful authority, the act would not constitute a nuisance. If the track was relocated in a proper manner and was maintained in a proper manner there was no nuisance. Tracks are laid down for the purpose of operating trains thereon. If the trains are operated in a proper manner, such operation does not constitute a nuisance. Necessarily the running of trains makes some noise and produces some vibrations. Locomotives pulling trains emit some smoke, sparks, and cinders, but these incidental results do not necessarily constitute a nuisance, but are the necessary incidents of the franchise granted a railroad company in connection with the conduct of its business. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938).

What is merely a matter of convenience to a railroad company is not a necessity and may constitute a nuisance. *Central of Ga. R.R. v. Collins*, 232 Ga. 790, 209 S.E.2d 1 (1974).

**Sale of intoxicants.** — The illegal sale of intoxicating liquors is a public nuisance, affecting the whole community in which the sale is carried on, and may be abated by process instituted in the name of the state, under this section. *Lofton v. Collins*, 117 Ga. 434, 43 S.E. 708, 61 L.R.A. 150 (1903); *Walker v. McNelly*, 121 Ga. 114, 48 S.E. 718 (1904); *Dispensary Comm'rs v. Hooper*, 128 Ga. 99, 56 S.E. 997 (1907).

The keeping or maintaining of any place or resort where intoxicating liquor is sold or kept for sale in a dry county, in violation of the provisions of Ch. 10 of T. 3 is a public, common nuisance, which may be abated by writ of injunction issued out of the superior court upon a bill filed by the attorney or the district attorney of the circuit, or by any citizen or citizens of such county. *Ogletree v. Atkinson*, 195 Ga. 32, 22 S.E.2d 783 (1942).

A private citizen cannot maintain an action to enjoin the operation of a retail liquor business without a valid license in a "wet" county unless he has sustained special injury, and its abatement must proceed for the public on information filed by the solicitor general (now district attorney). *Mabry v. Shikany*, 223 Ga. 513, 156 S.E.2d 364 (1967).

**Smoke.** — To constitute smoke a nuisance, it must be such as to produce a visible, tangible, and appreciable injury to property,



or such as to render it specially uncomfortable or inconvenient, or to materially interfere with the ordinary comfort of human existence. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941).

Smoke, unaccompanied with noise or noxious vapor, noise alone, offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighboring property. *Asphalt Prods. Co. v. Marable*, 65 Ga. App. 877, 16 S.E.2d 771 (1941).

**A steam laundry** is not a nuisance per se, and "smoke is not per se a nuisance" but a business otherwise lawful may become a nuisance in fact, or a nuisance per accidens, by reason of improper operation, or by reason of its location and the injury produced by such a lawful business is actionable if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. *Gatewood v. Hansford*, 75 Ga. App. 567, 44 S.E.2d 126 (1947).

**Display and sale of tombstones and monuments.** — The mere display and sale of tombstones and monuments designed and intended to be placed over the bodies and graves of deceased persons, such display being made on a lot in an exclusively residential section and in such manner as to present a "graveyard appearance," is not a nuisance, and may not be enjoined by residents and owners of property in the vicinity, on the grounds that it injuriously affects the values of their properties, and that the constant appearance of the spectacle would prey upon the minds and injuriously affect the health of the individuals. *Grubbs v. Wooten*, 189 Ga. 390, 5 S.E.2d 874 (1939).

**Increase in traffic congestion.** — Increase in traffic congestion in front of property resulting from construction of townhouse on adjacent property is a fanciful assertion of harm and does not constitute a nuisance. *Goddard v. Irby*, 255 Ga. 47, 335 S.E.2d 286 (1985).

**Unsignhtiness of adjacent property.** — The unsightliness of adjacent property alone, tending to devalue the adjoining property, is not such inconvenience as to amount to a nuisance under this section for which an injunction will lie. *Jillson v. Barton*, 139 Ga. App. 767, 229 S.E.2d 476 (1975).

**An interference with the natural flow of surface water** may amount to a nuisance, without the presence of the element of danger to health. *City of Macon v. Cannon*, 89 Ga. App. 484, 79 S.E.2d 816 (1954).

**Wrongful diversion of water onto property of another.** — To wrongfully turn water on the lands of another is a nuisance. *Goble v. Louisville & N.R.R.*, 187 Ga. 243, 200 S.E. 259 (1938).

**A wholesale grocery business** in a residential section of a city is not necessarily a nuisance of itself, and therefore a court of equity will not enjoin the construction of a building to be used for that purpose, where there is no zoning regulation or restrictive covenant inhibiting such use. *Roberts v. Rich*, 200 Ga. 497, 37 S.E.2d 401 (1946).

**Diversion of surface water.** — A county is subject to suit for damages, as well as injunctive relief, for maintaining a roadway in such manner as to constitute a continuing nuisance by diverting surface water onto the owner's property, and it is no defense that the property is not adjacent to the roadway in question. *Reid v. Gwinnett County*, 242 Ga. 88, 249 S.E.2d 559 (1978).

**Electromagnetic radiation.** — In an action against a utility and power company for damages on theories of trespass and nuisance arising from electromagnetic radiation, a grant of summary judgment on the trespass claim and directed verdict on the nuisance claim were proper for policy reasons since the scientific evidence was inconclusive regarding the invasive quality of magnetic fields from power lines. *Jordan v. Georgia Power Co.*, 219 Ga. App. 690, 466 S.E.2d 601 (1995).

## OPINIONS OF THE ATTORNEY GENERAL

**A municipality's potential liability for acts of a probationer** working on a community service project will have to be determined from the facts in each case, which will show

whether the injury is the result of a nuisance, as defined in § 41-1-1, or negligence, as stated in § 36-33-1. 1975 Op. Att'y Gen. No. 75-32.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, §§ 1-4.

**C.J.S.** — 66 C.J.S., Nuisances, §§ 1, 6, 8 et seq.

**ALR.** — Trolley poles in street as nuisance, 2 ALR 496.

Proximate cause as determining landlord's liability, where injury results to a third person from a nuisance that becomes such only upon tenant's using the premises, 4 ALR 740.

Pesthouse or contagious disease hospital as nuisance, 4 ALR 995; 18 ALR 122; 48 ALR 518.

Steam whistle as a nuisance, 4 ALR 1343.

Operation of railroad as nuisance to property, 6 ALR 723; 69 ALR 1188.

Nuisance resulting from smoke alone as subject for injunctive relief, 6 ALR 1575.

Fire escape as an attractive nuisance, 9 ALR 271.

Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of nuisances, or prescribing a pecuniary penalty therefor, 12 ALR 431; 121 ALR 642.

Liability of purchaser of premises for nuisance thereon created by predecessor, 14 ALR 1094.

Injunction against operation of talking machine, mechanical musical device, etc., 22 ALR 1200.

Noise from operation of industrial plant as nuisance, 23 ALR 1407; 90 ALR 1207.

Nuisance by encroachment of walls or other parts of building on another's land as permanent or continuing, 29 ALR 839.

Gas, water, or electric light plant as a nuisance, and the remedy therefor, 37 ALR 800.

Nuisance by manner of or circumstances attending performance of duty enjoined by law, 38 ALR 1437.

Attractive nuisances, 45 ALR 982; 53 ALR 1344; 60 ALR 1444.

Public "comfort stations," 55 ALR 472.

Induction, conduction and electrolysis, 56 ALR 421.

Tramroad or other private railroad as a nuisance, 57 ALR 943.

Newspaper or magazine as a nuisance, 58 ALR 614.

Burning of soft coal as a nuisance, 58 ALR 1225.

Oil as nuisance; liability for damage to adjoining property, 60 ALR 483.

Mosquitoes or other insect pests; conditions breeding as a nuisance, 61 ALR 1145.

Injunction against use of property for circuses, carnivals, and similar itinerant outdoor amusements, 63 ALR 407.

Pipeline as nuisance, 75 ALR 1325.

Dogs as nuisance, 79 ALR 1060.

Bakery as a nuisance, 86 ALR 998.

Liability of public contractor for damages from acts or conditions necessarily incident to work which would otherwise amount to nuisance, 97 ALR 205.

Aeroplanes and aeronautics, 99 ALR 173.

Cremation and crematories, 113 ALR 1128.

Automobile gas filling or supply station as a nuisance, 124 ALR 383.

Gas company's liability for injury or damage by escaping gas, 138 ALR 870.

Injunction against acts or conduct, in street or vicinity, tending to disparage plaintiff's business or his merchandise, 144 ALR 1181.

Use of property for production of war goods as affecting question of nuisance, and injunction to abate same, 145 ALR 611.

Supermarket, superstore, or public market as a nuisance, 146 ALR 1407.

Medical clinic as a nuisance, 153 ALR 972.

Zoning regulation as affecting question of nuisance within zoned area, 166 ALR 659.

Racing, or betting on races, as nuisance, 166 ALR 1264.

Attracting people in such numbers as to obstruct access to the neighboring premises, as nuisance, 2 ALR2d 437.

Coalyard as a nuisance, 8 ALR2d 419.

Public regulation and prohibition of sound amplifiers or loud-speaker broadcasts in streets and other public places, 10 ALR2d 627.

Animal rendering or bone-boiling plant or business as nuisance, 17 ALR2d 1269.

Stockyard as a nuisance, 18 ALR2d 1033.

Liability for injury to property occasioned by oil, water, or the like flowing from well, 19 ALR2d 1025.

Liability for injury on parking or strip between sidewalk and curb, 19 ALR2d 1053; 98 ALR3d 439.

Use of phonograph, loudspeaker, or other mechanical or electrical device for broadcasting music, advertising, or sales talk from business premises, as nuisance, 23 ALR2d 1289.

Dust as nuisance, 24 ALR2d 194; 79 ALR3d 253.

Tourist or trailer camp, motor court or motel, as nuisance, 24 ALR2d 571.

Private school as nuisance, 27 ALR2d 1249.

Quarries, gravel pits, and the like, as nuisances, 47 ALR2d 490.

Cemetery or burial ground as nuisance, 50 ALR2d 1324.

Public dump as nuisance, 52 ALR2d 1134.

Landowner's or occupant's liability in damages for escape, without negligence, of harmful gases or fumes from premises, 54 ALR2d 764; 2 ALR4th 1054.

Automobile sales lot or used car lot as nuisance, 56 ALR2d 776.

Attractive nuisance doctrine as applied to machine or machinery in motion other than vehicles, railroad cars, or streetcars, 62 ALR2d 898.

Golf course or driving range as a nuisance, 68 ALR2d 1331.

Contributory negligence or assumption of risk as defense to action for damages from nuisance — modern views, 73 ALR2d 1378.

Water sports, amusements, or exhibitions as nuisance, 80 ALR2d 1124.

Parking lot or place as nuisance, 82 ALR2d 413.

Practice of exacting usury as a nuisance or ground for injunction, 83 ALR2d 848.

Nonencroaching vegetation as a private nuisance, 83 ALR2d 936.

Automobile wrecking yard or place of business as nuisance, 84 ALR2d 653.

Oil refinery as a nuisance, 86 ALR2d 1322.

Liability of abutting owner or occupant for condition of sidewalk, 88 ALR2d 331.

Drive-in restaurant or cafe as nuisance, 91 ALR2d 572.

Dairy, creamery, or milk distributing plant, as nuisance, 92 ALR2d 974.

Drive-in theater or other outdoor dramatic or musical entertainment as nuisance, 93 ALR2d 1171.

Keeping pigs as a nuisance, 2 ALR3d 931.

Keeping poultry as nuisance, 2 ALR3d 965.

Motorbus or truck terminal as nuisance, 2 ALR3d 1372.

Electric generating plant or transformer station as nuisance, 4 ALR3d 902.

Saloons or taverns as nuisance, 5 ALR3d 989.

Keeping of dogs as enjoined nuisance, 11 ALR3d 1399.

Institution for the punishment or rehabilitation of criminals, delinquents, or alcoholics as enjoined nuisance, 21 ALR3d 1058.

Gun club, or shooting gallery or range, as nuisance, 26 ALR3d 661.

Keeping horses as nuisance, 27 ALR3d 627.

Children's playground as nuisance, 32 ALR3d 1127.

Billboards and other outdoor advertising signs as civil nuisance, 38 ALR3d 647.

Modern status of rules as to balance of convenience or social utility as affecting relief from nuisance, 40 ALR3d 601.

Operation of incinerator as nuisance, 41 ALR3d 1009.

Laundry or drycleaning establishment as nuisance, 41 ALR3d 1236.

Automobile racetrack or drag strip as nuisance, 41 ALR3d 1273.

Residential swimming pool as nuisance, 49 ALR3d 545.

Public swimming pool as nuisance, 49 ALR3d 652.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 696.

Liability of oil and gas lessee or operator for injuries to or death of livestock, 51 ALR3d 304.

Absolute liability for blasting operations as extending to injury or damage not directly caused by debris or concussion from explosion, 56 ALR3d 1017.

Zoo as nuisance, 58 ALR3d 1126.

Pornshops or similar places disseminating obscene materials as nuisance, 58 ALR3d 1134.

Interference with radio or television reception as nuisance, 58 ALR3d 1142.

Attractive nuisance doctrine as applied to trees, shrubs, and the like, 59 ALR3d 848.

Recovery of damages for emotional distress, fright, and the like, resulting from blasting operations, 75 ALR3d 770.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Existence of, and relief from, nuisance

created by operation of air conditioning or ventilating equipment, 79 ALR3d 320.

Fence as nuisance, 80 ALR3d 962.

Keeping bees as nuisance, 88 ALR3d 992.

Liability of swimming facility operator for injury to or death of trespassing child, 88 ALR3d 1197.

Liability for injury to or death of child from electric wire encountered while climbing tree, 91 ALR3d 616.

Liability for overflow of water confined or diverted for public power purposes, 91 ALR3d 1065.

Governmental liability from operation of zoo, 92 ALR3d 832.

Liability for injuries in connection with ice or snow on nonresidential premises, 95 ALR3d 15.

Bells, carillons, and the like, as nuisance, 95 ALR3d 1268.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from defect or obstruction on roadside parkway or parking strip, 98 ALR3d 439.

Recovery in trespass for injury to land

caused by airborne pollutants, 2 ALR4th 1054.

Funeral home as private nuisance, 8 ALR4th 324.

Windmill as nuisance, 36 ALR4th 1159.

Computer as nuisance, 45 ALR4th 1212.

Telephone calls as nuisance, 53 ALR4th 1153.

Tree or limb falling onto adjoining private property: personal injury and property damage liability, 54 ALR4th 530.

Liability of private landowner for vegetation obscuring view at highway or street intersection, 69 ALR4th 1092.

Tort liability for pollution from underground storage tank, 5 ALR5th 1.

State and local government control of pollution from underground storage tanks, 11 ALR5th 388.

Nuisance as entitling owner or occupant of real estate to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in addition to, damages for depreciation in value of property or its use, 25 ALR5th 568.

## 41-1-2. Classes of nuisances; public and private nuisances defined.

Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals. (Orig. Code 1863, § 2939; Code 1868, § 2946; Code 1873, § 2997; Code 1882, § 2997; Civil Code 1895, § 3858; Civil Code 1910, § 4454; Code 1933, § 72-102.)

**Cross references.** — When infraction of public duty gives cause of action to individual, § 51-1-7.

**Law reviews.** — For article discussing federal liability for pollution abatement in condemnation actions, see 17 Mercer L. Rev. 364 (1966). For article discussing Georgia's practice of exposing municipalities to tort

liability through the use of nuisance law, see 12 Ga. St. B.J. 11 (1975).

For note, "Town of Fort Oglethorpe v. Phillips: A Clarification of Georgia's Public Nuisance Law?," see 5 Ga. St. B.J. 474 (1969). For note discussing the abatement of nonconforming uses as nuisances, see 10 Ga. St. B.J. 302 (1973).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### PRIVATE NUISANCE

#### PUBLIC NUISANCE



### General Consideration

**Notice before suit not required.** — An action may be maintained under this section for damages resulting from a nuisance, without notice or request to abate it. *Exley v. Southern Cotton Oil Co.*, 151 F. 101 (S.D. Ga. 1907).

**Cited in** *Justices of Inferior Court v. Griffin & W. Point Plank Rd. Co.*, 15 Ga. 39 (1854); *Ison v. Manley*, 76 Ga. 804 (1886); *Kavanagh v. Mobile & G.R.R.*, 78 Ga. 271, 2 S.E. 636 (1887); *Cannon v. Merry*, 116 Ga. 291, 42 S.E. 274 (1902); *Lofton v. Collins*, 117 Ga. 434, 43 S.E. 708 (1903); *Savannah, F. & W. Ry. v. Gill*, 118 Ga. 737, 45 S.E. 623 (1903); *Edison v. Ramsey*, 146 Ga. 767, 92 S.E. 513 (1917); *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 100 S.E. 207, 6 ALR 1564 (1919); *Dean v. State*, 151 Ga. 371, 106 S.E. 792, 40 ALR 1132 (1921); *Town of Rentz v. Roach*, 154 Ga. 491, 115 S.E. 94 (1922); *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934); *Warren Co. v. Dickson*, 185 Ga. 481, 195 S.E. 568 (1938); *Harbuck v. Richland Box Co.*, 204 Ga. 352, 49 S.E.2d 883 (1948); *Isley v. Little*, 219 Ga. 23, 131 S.E.2d 623 (1963); *Burgess v. Johnson*, 223 Ga. 427, 156 S.E.2d 78 (1967); *Miree v. United States*, 526 F.2d 679 (5th Cir. 1976); *Abree v. Stone Mt. Mem. Ass'n*, 169 Ga. App. 167, 312 S.E.2d 142 (1983); *Jones v. State*, 265 Ga. 84, 453 S.E.2d 716 (1995); *Moreland v. Cheney*, 267 Ga. 469, 479 S.E.2d 745 (1997).

### Private Nuisance

**Definition.** — A “private nuisance” is one limited in its injurious effect to one or a few individuals, which may injure either the person or property or both, and in either case a right of action accrues. *Miller v. Coleman*, 213 Ga. 125, 97 S.E.2d 313 (1957).

**Mere violation of an ordinance** does not create a private nuisance. *Jillson v. Barton*, 139 Ga. App. 767, 229 S.E.2d 476 (1975).

**Actionability of private nuisance.** — The creation of a private nuisance is actionable, without regard to the question of negligence. *Bonner v. Welborn*, 7 Ga. 296 (1849); *Exley v. Southern Cotton Oil Co.*, 151 F. 101 (S.D. Ga. 1907).

### Public Nuisance

**Extensive injuries not required.** — The language in this section is not used in the sense that every person in the area must have been actually hurt or injured in order to show a public nuisance. *Atlanta Processing Co. v. Brown*, 227 Ga. 203, 179 S.E.2d 752 (1971).

**Gaming house.** — The maintenance of a gaming house or a gaming place is a public nuisance. *Gullatt v. State ex rel. Collins*, 169 Ga. 538, 150 S.E. 825 (1929); *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

**Street-flow obstructions.** — Any permanent structure in a street which materially interferes with travel thereon is a public nuisance. *City of East Point v. Henry Chanin Corp.*, 210 Ga. 628, 81 S.E.2d 812 (1954).

**The landing and steps of a church**, though allegedly so negligently constructed as to be hazardous to life and limb, do not constitute a public nuisance since there is no right common to all of the public to use the steps and landing of a church of a particular denomination. *Cox v. DeJarnette*, 104 Ga. App. 664, 123 S.E.2d 16 (1961).

**Plate glass doors.** — Maintenance and operation of plate glass doors in public civic center not public nuisance. See *Zellers v. Theater of Stars, Inc.*, 171 Ga. App. 406, 319 S.E.2d 553 (1984).

**Barricades on a county road** marking the approaches to the former site of a timber bridge spanning a railroad track did not constitute a public nuisance. *Kitchen v. CSX Transp., Inc.*, 265 Ga. 206, 453 S.E.2d 712 (1995).

**Repeated violations with threats of continuing same.** — Constant and repeated violations of former statutes relating to the business of buying wages or salaries, and to the small-loan business, with threats to continue the same, do not amount to such a public nuisance as may be abated and prevented by a suit in the name of the state. *State ex rel. Boykin v. Ball Inv. Co.*, 191 Ga. 382, 12 S.E.2d 574 (1940).

**Indictment for public nuisance.** — A public nuisance is the subject of indictment; not of action. *South Carolina R.R. v. Moore & Philpot*, 28 Ga. 398, 73 Am. Dec. 778 (1859).

### OPINIONS OF THE ATTORNEY GENERAL

**Obstruction of crossing on public highway by railroad.** — A public nuisance possibly occurs if a railroad blocks a crossing on a public highway for an unreasonable period of time; for such an action to lie against a

railroad, it must be shown that the particular act is an interference or annoyance to the public in the common use of public highways. 1970 Op. Att'y Gen. No. 70-58.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, §§ 32-49.

**C.J.S.** — 66 C.J.S., Nuisances, § 2.

**ALR.** — Trolley poles in street as nuisance, 2 ALR 496.

Noise from operation of industrial plant as nuisance, 23 ALR 1407; 90 ALR 1207.

Nuisance by encroachment of walls or other parts of building on another's land as permanent or continuing, 29 ALR 839.

Amusement park as nuisance, 33 ALR 725.

Gas, water, or electric light plant as a nuisance, and the remedy therefor, 37 ALR 800.

Pesthouse or contagious disease hospital as nuisance, 48 ALR 518.

Aeroplanes and aeronautics, 99 ALR 173.

Legal aspects of radio communication and broadcasting, 124 ALR 982; 171 ALR 765.

Nuisance within contemplation of statute imposing upon municipality duty to keep streets and other public places free from "nuisance," as absolute nuisance or as qualified nuisance, dependent upon negligence, 155 ALR 60.

Racing, or betting on races, as nuisance, 166 ALR 1264.

Animal rendering or bone-boiling plant or business as nuisance, 17 ALR2d 1269.

Liability for injury to property occasioned

by oil, water, or the like flowing from well, 19 ALR2d 1025.

Landowner's or occupant's liability in damages for escape, without negligence, of harmful gases or fumes from premises, 54 ALR2d 764; 2 ALR4th 1054.

Automobile sales lot or used car lot as nuisance, 56 ALR2d 776.

Saloons or taverns as nuisance, 5 ALR3d 989.

Keeping of dogs as enjoynable nuisance, 11 ALR3d 1399.

Children's playground as nuisance, 32 ALR3d 1127.

Public swimming pool as nuisance, 49 ALR3d 652.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

Unsolicited mailing, distribution, house call, or telephone call as invasion of privacy, 56 ALR3d 457.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 ALR3d 665.

Recovery in trespass for injury to land caused by airborne pollutants, 2 ALR4th 1054.

Carwash as nuisance, 4 ALR4th 1308.

Funeral home as private nuisance, 8 ALR4th 324.

### 41-1-3. Right of action for public nuisance generally.

A public nuisance generally gives no right of action to any individual. However, if a public nuisance in which the public does not participate causes special damage to an individual, such special damage shall give a right of action. (Orig. Code 1863, §§ 2939, 2940; Code 1868, §§ 2946, 2947; Code 1873, §§ 2997, 2998; Code 1882, §§ 2997, 2998; Civil Code 1895, §§ 3858, 3859; Civil Code 1910, §§ 4454, 4455; Code 1933, § 72-103.)

**Cross references.** — Penalty for maintaining house in which gaming, drinking, or other misbehavior occurs, or which presents

common disturbance to neighborhood, § 16-11-44. When infraction of public duty gives cause of action to individual, § 51-1-7.

**Law reviews.** — For article discussing Georgia's practice of exposing municipalities to tort liability through the use of nuisance law, see 12 Ga. St. B.J. 11 (1975). For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978).

For note, "Town of Fort Oglethorpe v. Phillips: A Clarification of Georgia's Public Nuisance Law?," see 5 Ga. St. B.J. 474 (1969). For note discussing the abatement of nonconforming uses as nuisances, see 10 Ga. St. B.J. 302 (1973).

### JUDICIAL DECISIONS

#### **Right of action grows out of special injury.**

— Even though a given condition may constitute a public nuisance, a citizen suffering special damage has a cause of action against the person creating or maintaining the same. *City of Blue Ridge v. Kiker*, 189 Ga. 717, 7 S.E.2d 237 (1940).

Even though a given condition may constitute a public nuisance, a citizen suffering special damage by reason of sickness of himself or family, or depreciation of his property, as the result thereof, has a cause of action against the party creating or maintaining the nuisance. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

**All injury to health is special**, and necessarily limited in its effect to the individual affected, and is, in its nature, irreparable. It matters not that others within the sphere of the operation of the nuisance, whether public or private, may be affected likewise. *De Vaughn v. Minor*, 77 Ga. 809, 1 S.E. 433 (1887); *Hunnicut v. Eaton*, 184 Ga. 485, 191 S.E. 919 (1937).

**Necessity of showing special damages.** — In order for an individual to abate a public nuisance it is necessary that he show special damages. *Moon v. Clark*, 192 Ga. 47, 14 S.E.2d 481 (1941).

**Interference with egress to and ingress from highway.** — A landowner may maintain a suit in equity to enjoin further interference with his means of egress to and ingress from the public highway, when such interference amounts to a continuing nuisance or trespass, and where an injunction would prevent a multiplicity of suits. *Barham v. Grant*, 185 Ga. 601, 196 S.E. 43 (1937).

Damages for one whose means of egress from and ingress to his property abutting on a public highway is illegally and unnecessarily interfered with may be the depreciation in market value, if the obstruction is a permanent one, or the damage to business and

loss of profits. Punitive damages may be recovered where the circumstances are such as to justify the allowance thereof. *Holland v. Shackelford*, 220 Ga. 104, 137 S.E.2d 298 (1964).

**Plaintiff must allege special damage within petition.** — Allegations of petition in which petitioners sought equitable relief "as individuals, citizens, and taxpayers" from the closing of a railroad crossing were insufficient to show special damage to petitioners, or any damage not shared equally by all other "individuals, citizens, and taxpayers," and the petition was therefore insufficient for the grant of any relief to the petitioners as individuals, citizens, and taxpayers. *State Hwy. Dep't v. Reed*, 211 Ga. 197, 84 S.E.2d 561 (1954).

Allegations of petition seeking to enjoin an alleged nuisance in operating asphalt and cement-mixing and manufacturing plant as to the spilling of concrete and asphalt in a public street and its effect on persons walking along the street related to a public nuisance, and stating no special damage, showed no cause of action. *Asphalt Prods. Co. v. Beard*, 189 Ga. 610, 7 S.E.2d 172 (1940).

**Building of dam.** — The right of a company to build a dam does not include a right to build or maintain it in such negligent or improper manner as to cause a nuisance injurious to the health of the adjacent community. For damages arising from such things an action will lie. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

**Damages recoverable include injury to health.** — In this state damages recoverable on account of a nuisance are not limited to injury to realty, but injury to health may furnish a basis for such recovery. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

**A municipality need not be joined as a party** to an action to abate a nuisance which



specially injured the plaintiff. *Trust Co. v. Ray*, 125 Ga. 485, 54 S.E. 145 (1906).

**Right of action where road is obstructed.**

— To maintain an action for an injury received from an obstruction in a highway, two things must concur: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. *Branan v. May*, 17 Ga. 136 (1855).

The right of a municipality to grant a person the power to obstruct a street, is dependent on legislative authority, hence, the unauthorized obstruction of a street furnishing an avenue of approach to one's place of business is actionable. *Coker v. Atlanta, K. & N. Ry.*, 123 Ga. 483, 51 S.E. 481 (1905); *Hendricks v. Jackson*, 143 Ga. 106, 84 S.E. 440 (1915).

Where the owner of adjoining property suffers special damage from the unlawful running of cars in a public street, this entitled her to maintain an action. *Kavanagh v. Mobile & G.R.R.*, 78 Ga. 271, 2 S.E. 636 (1887).

Where sickness results from the stagnation of a pool of water a cause of action exists. *Savannah, F. & W. Ry. v. Parish*, 117 Ga. 893, 45 S.E. 280 (1903).

**Cited in** *Vason v. South Carolina R.R.*, 42 Ga. 631 (1871); *Austin v. Augusta Term. Ry.*, 108 Ga. 671, 34 S.E. 852 (1899); *Sammons v. Sturgis*, 145 Ga. 663, 89 S.E. 774 (1916); *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 100 S.E. 207 (1919); *Knox v. Reese*, 149 Ga. 379, 100 S.E. 371 (1919); *Warren Co. v. Dickson*, 185 Ga. 481, 195 S.E. 568 (1938); *Poole v. Arnold*, 187 Ga. 734, 2 S.E.2d 83 (1939); *Floyd v. City of Albany*, 105 Ga. App. 31, 123 S.E.2d 446 (1961); *Save The Bay Comm., Inc. v. Mayor of Savannah*, 227 Ga. 436, 181 S.E.2d 351 (1971); *Brock v. Hall County*, 239 Ga. 160, 236 S.E.2d 90 (1977); *Stephens v. Tate*, 147 Ga. App. 366, 249 S.E.2d 92 (1978); *Brand v. Wilson*, 252 Ga. 416, 314 S.E.2d 192 (1984); *Rea v. Bunce*, 179 Ga. App. 628, 347 S.E.2d 676 (1986).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, §§ 254-259.

**C.J.S.** — 66 C.J.S., Nuisances, §§ 78, 79.

**ALR.** — Trolley poles in street as nuisance, 2 ALR 496.

Right to enjoin threatened or anticipated nuisance, 32 ALR 724; 55 ALR 880.

Gas, water, or electric light plant as a nuisance, and the remedy therefor, 37 ALR 800.

Automobile gas filling or supply station as a nuisance, 124 ALR 383.

Liability of private persons or corporations draining into sewer maintained by municipality or other public body for damages to riparian owners or others, 170 ALR 1192.

Attracting people in such numbers as to obstruct access to the neighboring premises, as nuisance, 2 ALR2d 437.

Animal rendering or bone-boiling plant or business as nuisance, 17 ALR2d 1269.

Sewage disposal plant as nuisance, 40 ALR2d 1177.

Liability for property damage caused by vibrations, or the like, without blasting or explosion, 79 ALR2d 966.

Liability of abutting owner or occupant for condition of sidewalk, 88 ALR2d 331.

Statutes, ordinances, or regulations relating to private residential swimming pools, 92 ALR2d 1283.

Saloons or taverns as nuisance, 5 ALR3d 989.

Water distributor's liability for injuries due to condition of service lines, meters, and the like, which serve individual consumer, 20 ALR3d 1363.

Liability for injury or damage caused by rocket testing or firing, 29 ALR3d 556.

Children's playground as nuisance, 32 ALR3d 1127.

Liability in connection with fire or explosion of explosives while being stored or transported, 35 ALR3d 1177.

Public swimming pool as nuisance, 49 ALR3d 652.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Existence of, and relief from, nuisance created by operation of air conditioning or ventilating equipment, 79 ALR3d 320.

Liability of swimming facility operator for injury to or death of diver allegedly resulting



from hazardous condition in water, 85 ALR3d 750.

Zoning regulations limiting use of property near airport as taking of property, 18 ALR4th 542.

Airport operations or flight of aircraft as

constituting taking or damaging of property, 22 ALR4th 863.

What constitutes special injury that entitles private party to maintain action based on public nuisance — modern cases, 71 ALR4th 13.

#### 41-1-4. Right of action for private nuisance generally.

A private nuisance may injure either a person or property, or both, and for that injury a right of action accrues to the person who is injured or whose property is damaged. (Orig. Code 1863, §§ 2939, 2941; Code 1868, §§ 2946, 2948; Code 1873, §§ 2997, 2999; Code 1882, §§ 2997, 2999; Civil Code 1895, §§ 3858, 3860; Civil Code 1910, §§ 4454, 4456; Code 1933, § 72-104.)

**Law reviews.** — For note discussing nuisance action as a remedy for damage caused by sonic booms, see 2 Ga. L. Rev. 83 (1967). For note, "Town of Fort Oglethorpe v.

Phillips: A Clarification of Georgia's Public Nuisance Law?," see 5 Ga. St. B.J. 474 (1969).

### JUDICIAL DECISIONS

**Coming to a nuisance.** — The old rule, maintained by some authorities, that coming to a nuisance will prevent a person so coming from making any complaint, has long since been exploded. *Miller v. Coleman*, 213 Ga. 125, 97 S.E.2d 313 (1957).

**One who purchases land adjoining a private nuisance** may abate it. *City of Rentz v. Roach*, 154 Ga. 491, 115 S.E. 94 (1922).

Charge that plaintiffs had the right to move near a kennel though they knew it was a nuisance, and could rely on the presumption that the nuisance would be abated and stopped, was not erroneous. *Miller v. Coleman*, 213 Ga. 125, 97 S.E.2d 313 (1957).

**Recovery for both personal and property damage.** — Damages for discomfort and

annoyance caused to the owner and his family are separate and distinct from damage to the value of the realty and do not constitute a double recovery for a single injury. In an action for nuisance, the property owners may recover for both damage to person and damage to property. *City of Atlanta v. Murphy*, 194 Ga. App. 652, 391 S.E.2d 474 (1990).

**Cited in** *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934); *Scott v. Reynolds*, 70 Ga. App. 545, 29 S.E.2d 88 (1944); *Southeastern Liquid Fertilizer Co. v. Chapman*, 103 Ga. App. 773, 120 S.E.2d 651 (1961); *Turner v. Ross*, 115 Ga. App. 507, 154 S.E.2d 798 (1967).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, §§ 254-258, 268, 269.

**C.J.S.** — 66 C.J.S., Nuisances, §§ 80-82.

**ALR.** — Effect of delay in seeking equitable relief against nuisance, 6 ALR 1098.

Right to enjoin threatened or anticipated nuisance, 32 ALR 724; 55 ALR 880.

Oil as nuisance; liability for damage to adjoining property, 60 ALR 483.

Automobile gas filling or supply station as a nuisance, 124 ALR 383.

Legal aspects of radio communication and broadcasting, 124 ALR 982; 171 ALR 765.

Nuisance as entitling owner or occupant of real estate to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in addition to, damages for depreciation in

value of property or its use, 142 ALR 1307.

Injunction against acts or conduct, in street or vicinity, tending to disparage plaintiff's business or his merchandise, 144 ALR 1181.

Supermarket, superstore, or public market as a nuisance, 146 ALR 1407.

Liability of private persons or corporations draining into sewer maintained by municipality or other public body for damages to riparian owners or others, 170 ALR 1192.

When statute of limitation commences to run against damage from overflow of land caused by artificial construction or obstruction, 5 ALR2d 302.

Casting of light on another's premises as constituting actionable wrong, 5 ALR2d 705; 79 ALR3d 253.

Fire as attractive nuisance, 27 ALR2d 1187.

Private school as nuisance, 27 ALR2d 1249.

Liability of landowner for injury to or death of child caused by cave-in or landslide, 28 ALR2d 195.

Liability of landowner for injury to or death of child resulting from piled or stacked lumber or other building materials, 28 ALR2d 218.

Expense incurred by injured party in remedying temporary nuisance or in preventing injury as element of damages recoverable, 41 ALR2d 1064.

Landowner's or occupant's liability in damages for escape, without negligence, of harmful gases or fumes from premises, 54 ALR2d 764; 2 ALR4th 1054.

Rule of municipal immunity from liability for acts in performance of governmental functions as applicable to personal injury or death as result of a nuisance, 56 ALR2d 1415.

Liability for property damage caused by vibrations, or the like, without blasting or explosion, 79 ALR2d 966.

Nonencroaching vegetation as a private nuisance, 83 ALR2d 936.

Liability of vendor or grantor of real estate for personal injury to purchaser or third person due to defective condition of premises, 48 ALR3d 1027.

Residential swimming pool as nuisance, 49 ALR3d 545.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Operation of cement plant as nuisance, 82 ALR3d 1004.

Recovery in trespass for injury to land caused by airborne pollutants, 2 ALR4th 1054.

Funeral home as private nuisance, 8 ALR4th 324.

Zoning regulations limiting use of property near airport as taking of property, 18 ALR4th 542.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 ALR4th 863.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 ALR4th 603.

#### **41-1-5. Right of action of alienee of injured property for continuance of nuisance; necessity for request to abate nuisance.**

(a) The alienee of a person owning property injured may maintain an action for continuance of the nuisance for which the alienee of the property causing the nuisance is responsible.

(b) Prior to commencement of an action by the alienee of the property injured against the alienee of the property causing the nuisance, there must be a request to abate the nuisance. (Code 1863, § 2943; Code 1868, § 2950; Code 1873, § 3001; Code 1882, § 3001; Civil Code 1895, § 3862; Civil Code 1910, § 4458; Code 1933, § 72-105; Ga. L. 1991, p. 94, § 41.)

**Cross references.** — Covenants and warranties relating to land transactions generally, § 44-5-60 et seq.

**Law reviews.** — For article discussing nuisances as "Hidden Liens," see 14 Ga. St. B.J. 32 (1977).

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

## NOTICE OF EXISTENCE OF NUISANCE

## General Consideration

**This section is a codification of the common law.** *Bonner v. Welborn*, 7 Ga. 296 (1849); *Roberts v. Georgia Ry. & Power Co.*, 151 Ga. 241, 106 S.E. 258 (1921).

**Section inapplicable where alienee induces original injury.** — This section does not apply where the original injury was caused by the alienee, hence, no notice to abate is necessary. *Southern Ry. v. Puckett*, 121 Ga. 322, 48 S.E. 968 (1904); *Davis v. Beard*, 202 Ga. App. 784, 415 S.E.2d 522 (1992).

**Cited in** *Phinizy v. City Council*, 47 Ga. 266 (1872); *Felker v. Calhoun*, 64 Ga. 514 (1880); *Williams v. Southern Ry.*, 140 Ga. 713, 79 S.E. 850 (1913); *Smith v. Central of Ga. Ry.*, 22 Ga. App. 572, 96 S.E. 570 (1918); *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946); *Martin v. Medlin*, 83 Ga. App. 589, 64 S.E.2d 73 (1951); *Shaheen v. G & G Corp.*, 230 Ga. 646, 198 S.E.2d 853 (1973).

## Notice of Existence of Nuisance

**Notice of existence or request for abatement must be given alienee.** — Under this section notice to an alienee that he will be held responsible for any damages subsequently caused by the nuisance will suffice in lieu of a specific request to abate. *Central R.R. v. English*, 73 Ga. 366 (1884); *Central of Ga. Ry. v. Americus Constr. Co.*, 133 Ga. 392, 65 S.E. 855 (1909).

It is error to charge that a lessee need not receive notice where the evidence conflicted on the question of whether he had increased the nuisance. *Seaboard & R.R. v. Ambrose*, 122 Ga. 47, 49 S.E. 815 (1905).

Damages prior to such notice cannot be recovered. *City Council v. Marks*, 124 Ga. 365, 52 S.E. 539 (1905); *Roberts v. Georgia Ry. & Power Co.*, 151 Ga. 241, 106 S.E. 258 (1921).

Before a cause of action for maintenance of a nuisance arises against alienee of nuisance, there must be a notice of the existence of the nuisance, or a request to abate it,

given to alienee; mere passive knowledge of the existence of the nuisance by alienee is not sufficient. *Georgia Power Co. v. Fincher*, 46 Ga. App. 524, 168 S.E. 109 (1933).

While an action will lie without notice against one who erects and maintains a nuisance, notice is a prerequisite against one who merely acquires property on which there is an existing nuisance, passively permits its continuance, and adds nothing thereto. *Georgia Power Co. v. Moore*, 47 Ga. App. 411, 170 S.E. 520 (1933).

The maintenance of the nuisance after notice is continuance of the nuisance, and the alienee of the property causing the nuisance is responsible for that continuance, if there is a request for abatement before action is filed. *Hoffman v. Atlanta Gas Light Co.*, 206 Ga. App. 727, 426 S.E.2d 387 (1992).

**Notice of abatement where alienee increases nuisance.** — A grantee or alienee of property causing a nuisance is not liable for damages caused by its continued maintenance and accruing prior to a notice or request to abate; but it is also the rule that where the alienee of property on which is situated a nuisance does anything to increase the nuisance, he may be sued without notice to abate. *Savannah Elec. & Power Co. v. Horton*, 44 Ga. App. 578, 162 S.E. 299 (1932).

While notice is required to one who merely purchases land and fails to remove a nuisance created by another, yet it is not necessary to an alienee, who knowingly does some additional act to actively maintain and use a nuisance originally created by another, or does something to increase the existing nuisance or its injurious effects, and thus creates in effect a fresh nuisance. *Georgia Power Co. v. Moore*, 47 Ga. App. 411, 170 S.E. 520 (1933).

**No duty to move away.** — Where a person rents land which is adjacent to a nuisance, he is under no duty to move away. *Central R.R. v. English*, 73 Ga. 366 (1884).

**Jury instruction on imputed notice of nuisance.** — Upon the trial of a suit against



**Notice of Existence of Nuisance (Cont'd)**

alienee of a nuisance to recover damages for maintenance of the nuisance, which arises out of the construction of the dam which alienee's predecessor in title had erected, and which alienee had not altered, it was error for court to instruct jury that, where the agent of the defendant in charge of the dam as superintendent is the same person who had held the same position with defendant's predecessor in title, and who, as superintendent for latter, had notice of the existence of the nuisance, knowledge by him of this fact constituted notice to defendant of the existence of the nuisance. *Georgia Power Co. v. Fincher*, 46 Ga. App. 524, 168 S.E. 109 (1933).

**Property purchased with knowledge of nuisance.** — Purchaser of property upon which there is an existing nuisance is not barred from his right to recover damages resulting from a continuation of the nuisance by the defendant, after requesting defendant to abate the nuisance, by the fact

that he purchased the property with knowledge of the nuisance. *Roughton v. Thiele Kaolin Co.*, 209 Ga. 577, 74 S.E.2d 844 (1953).

The owner or lessee of land although taking with knowledge of a nuisance, has a right to presume that, being illegal, it will be abated; and, if it is not, he may sue for damages resulting to him therefrom. *Ingram v. City of Acworth*, 90 Ga. App. 719, 84 S.E.2d 99 (1954).

**Measure of damages.** *Mayor of Gainesville v. Robertson*, 25 Ga. App. 632, 103 S.E. 853 (1920).

**Notice to the alienee cannot be set up by an amendment.** *Blackstock v. Southern Ry.*, 120 Ga. 414, 47 S.E. 902 (1904).

**Variance between allegations and proof.** — Allegations that damage was caused by the erection of a nuisance by the defendant are not supported by evidence that it was erected by the predecessor in title. *Southern Ry. v. Cook*, 106 Ga. 450, 32 S.E. 585 (1899); *DeLoach v. Georgia C. & P.R.R.*, 137 Ga. 633, 73 S.E. 1072 (1912).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, §§ 125-129, 258.

**C.J.S.** — 66 C.J.S., Nuisances, §§ 86, 88.

**ALR.** — Liability for property damage caused by vibrations, or the like, without blasting or explosion, 79 ALR2d 966.

Landowner's right to relief against pollu-

tion of his water supply by industrial or commercial waste, 39 ALR3d 910.

"Coming to nuisance" as a defense or estoppel, 42 ALR3d 344.

Residential swimming pool as nuisance, 49 ALR3d 545.

Computer as nuisance, 45 ALR4th 1212.

**41-1-6. Erection or continuance of nuisance after notice to abate.**

Any person who shall erect or continue after notice to abate a nuisance which tends to annoy the community, injure the health of the citizens in general, or corrupt the public morals shall be guilty of a misdemeanor. (Laws 1833, Cobb's 1851 Digest, p. 817; Code 1863, § 4437; Code 1868, § 4478; Code 1873, § 4562; Code 1882, § 4562; Penal Code 1895, § 641; Penal Code 1910, § 681; Code 1933, § 72-9901.)

**Cross references.** — Offenses against public health and morals generally, Ch. 12, T. 16.

**JUDICIAL DECISIONS**

**City criminal court empowered to abate nuisances.** — The fact that the General Assembly made the continuation of a nui-

sance after notice to abate a misdemeanor, does not preclude the criminal court of Cordele's power to abate nuisances pursuant

to the legislative authorization in § 41-2-5, and its power to enforce its judgments by contempt pursuant to the legislative authorization in the city charter. *Horne v. City of*

*Cordele*, 254 Ga. 346, 329 S.E.2d 134 (1985).

**Cited in** *Vason v. City of Augusta*, 38 Ga. 542 (1868); *City of Atlanta v. Pazol*, 95 Ga. App. 598, 98 S.E.2d 216 (1957).

### OPINIONS OF THE ATTORNEY GENERAL

**Substandard buildings in town or city.** — If substandard buildings in a town or city are alleged to be a nuisance, this may be determined in accordance with § 41-2-5; this determination must be made subject to the due process provisions of state and federal Constitutions; if a nuisance is found to exist, the court can order its abatement; if the

property owner fails to abate the nuisance, he may be bound over to a court having jurisdiction of misdemeanors; the municipality cannot itself demolish the offending buildings unless it condemns the property and compensates the owner. 1970 Op. Att'y Gen. No. U70-229.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, §§ 233-234, 346-349.

**C.J.S.** — 66 C.J.S., Nuisances, §§ 160, 162.

**ALR.** — Statutes, ordinances, or regulations relating to private residential swimming pools, 92 ALR2d 1283.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

### 41-1-7. Treatment of agricultural facilities and operations as nuisances.

(a) It is the declared policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land and facilities for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance actions. As a result, agricultural facilities are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements or adopting new technology or methods. It is the purpose of this Code section to reduce losses of the state's agricultural resources by limiting the circumstances under which agricultural facilities and operations may be deemed to be a nuisance.

(b) As used in this Code section, the term:

(1) "Agricultural facility" includes, but is not limited to, any land, building, structure, pond, impoundment, appurtenance, machinery, or equipment which is used for the commercial production or processing of crops, livestock, animals, poultry, honeybees, honeybee products, livestock products, poultry products, or products which are used in commercial aquaculture. Such term shall also include any farm labor camp or facilities for migrant farm workers.

(2) "Agricultural operation" means:

(A) The plowing, tilling, or preparation of soil at an agricultural facility;

- (B) The planting, growing, fertilizing, or harvesting of crops;
- (C) The application of pesticides, herbicides, or other chemicals, compounds, or substances to crops, weeds, or soil in connection with the production of crops, livestock, animals, or poultry;
- (D) The breeding, hatching, raising, producing, feeding, keeping, slaughtering, or processing of livestock, hogs, equines, chickens, turkeys, poultry or other fowl normally raised for food, mules, cattle, sheep, goats, dogs, rabbits, or similar farm animals for commercial purposes;
- (E) The production and keeping of honeybees, the production of honeybee products, and honeybee processing facilities;
- (F) The production, processing, or packaging of eggs or egg products;
- (G) The manufacturing of feed for poultry or livestock;
- (H) The rotation of crops;
- (I) Commercial aquaculture;
- (J) The application of existing, changed, or new technology, practices, processes, or procedures to any agricultural operation; and
- (K) The operation of any roadside market.

(c) No agricultural facility or any agricultural operation at an agricultural facility shall be or shall become a nuisance, either public or private, as a result of changed conditions in or around the locality of such agricultural facility if the agricultural facility has been in operation for one year or more. The provisions of this subsection shall not apply when a nuisance results from the negligent, improper, or illegal operation of any agricultural facility.

(d) For purposes of this Code section, the established date of operation is the date on which an agricultural operation commenced operation. If the physical facilities of the agricultural operation are subsequently expanded or new technology adopted, the established date of operation for each change is not a separately and independently established date of operation and the commencement of the expanded operation does not divest the agricultural operation of a previously established date of operation. (Ga. L. 1980, p. 1253, §§ 1, 2; Ga. L. 1988, p. 1775, § 1; Ga. L. 1989, p. 317, § 1.)

**Cross references.** — Legislative declaration of intent to encourage development and operation of new family farms through establishment of Georgia Residential Finance Authority, § 8-3-171.

**Code Commission notes.** — Pursuant to

Code Section 28-9-5, in 1988, the correct spelling of "technology" was substituted in the second sentence of subsection (d).

**Law reviews.** — For article, "Agricultural Nuisances and the Georgia 'Right to Farm' Law," see 23 Ga. St. B.J. 19 (1986). For



article, "Agricultural Nuisances Under the Amended Georgia 'Right-to-Farm' Law," see 25 Ga. St. B.J. 36 (1988).

### JUDICIAL DECISIONS

**"Changed conditions in the locality" construed.** — Language in subsection (c) "changed conditions in ... the locality" of the facility refers solely to extension of nonagricultural land uses, residential or otherwise, into existing agricultural areas. *Herrin v. Opatut*, 248 Ga. 140, 281 S.E.2d 575 (1981).

**Changed conditions in locality.** — Where plaintiffs were making nonagricultural uses of their lands prior to establishment of defendants' farm, if defendants' facility is a nuisance, it is not so as a result of changed conditions in locality, within meaning of this section. *Herrin v. Opatut*, 248 Ga. 140, 281 S.E.2d 575 (1981).

**Determination of whether facility is insulated from abatement.** — In determining whether agricultural facility is insulated under this section from abatement as a nuisance, the court must inquire (1) whether operation is an agricultural facility within meaning of section; (2) whether a nuisance

action is being brought as a result of changed conditions in locality of facility; and (3) whether facility has been in operation for one year or more prior to changed conditions in surrounding locality. *Herrin v. Opatut*, 248 Ga. 140, 281 S.E.2d 575 (1981).

**Nuisances not arising from urban sprawl are not covered.** — That which may constitute a nuisance regardless of urban sprawl, such as polluting a stream, is never protected by this section since such activity does not become a nuisance as a result of changed conditions in surrounding locality. *Herrin v. Opatut*, 248 Ga. 140, 281 S.E.2d 575 (1981).

**Abatement of facilities in operation for long periods.** — This section does not provide that a facility in operation for one year can never be abated as nuisance. *Herrin v. Opatut*, 248 Ga. 140, 281 S.E.2d 575 (1981).

**Cited in** *Roberts v. Southern Wood Piedmont Co.*, 173 Ga. App. 757, 328 S.E.2d 391 (1985).

### OPINIONS OF THE ATTORNEY GENERAL

**Egg farm located in nonagricultural, residential area** would not be entitled to protec-

tion from nuisance suits offered by this section. 1980 Op. Att'y Gen. No. U80-51.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, §§ 190, 191, 198, 200, 203, 209.

**C.J.S.** — 66 C.J.S., Nuisances, §§ 32 to 34, 44, 51, 56, 57, 69.

### 41-1-8. Treatment of publicly owned cultural facilities as nuisances.

(a) It is declared the public policy of this state to conserve, protect, and encourage the development of publicly owned cultural facilities. In order to encourage the establishment and maintenance of publicly owned cultural facilities, it is the purpose of this Code section to limit the circumstances under which a publicly owned cultural facility may be deemed to be a nuisance.

(b) Neither a publicly owned cultural facility nor a facility operated on lease from a publicly owned cultural facility nor any of the appurtenances thereof nor the operation thereof shall be or become a nuisance, either public or private, solely as a result of changed conditions in or around the



locality of such cultural facility if such cultural facility has been in operation for one year or more. (Code 1981, § 41-1-8, enacted by Ga. L. 1987, p. 999, § 1; Ga. L. 1994, p. 97, § 41.)

#### **41-1-9. Sport shooting ranges.**

(a) As used in this Code section, the term:

(1) "Person" means an individual, proprietorship, partnership, corporation, or unincorporated association.

(2) "Sport shooting range" or "range" means an area designated and operated by a person for the sport shooting of firearms and not available for such use by the general public without payment of a fee, membership contribution, or dues or by invitation of an authorized person, or any area so designated and operated by a unit of government, regardless of the terms of admission thereto.

(3) "Unit of government" means any of the departments, agencies, authorities, or political subdivisions of the state, cities, municipal corporations, townships, or villages and any of their respective departments, agencies, or authorities.

(b) No sport shooting range shall be or shall become a nuisance, either public or private, solely as a result of changed conditions in or around the locality of such range if the range has been in operation for one year since the date on which it commenced operation as a sport shooting range. Subsequent physical expansion of the range or expansion of the types of firearms in use at the range shall not establish a new date of commencement of operations for purposes of this Code section.

(c) No sport shooting range or unit of government or person owning, operating, or using a sport shooting range for the sport shooting of firearms shall be subject to any action for civil or criminal liability, damages, abatement, or injunctive relief resulting from or relating to noise generated by the operation of the range if the range remains in compliance with noise control or nuisance abatement rules, regulations, statutes, or ordinances applicable to the range on the date on which it commenced operation.

(d) No rules, regulations, statutes, or ordinances relating to noise control, noise pollution, or noise abatement adopted or enacted by a unit of government shall be applied retroactively to prohibit conduct at a sport shooting range, which conduct was lawful and being engaged in prior to the adoption or enactment of such rules, regulations, statutes, or ordinances. (Code 1981, § 41-1-9, enacted by Ga. L. 1997, p. 796, § 1.)

**Effective date.** — This Code section became effective July 1, 1997.

**Editor's notes.** — Ga. L. 1997, p. 796, § 2, not codified by the General Assembly, makes

this Code section applicable to conduct occurring on or after July 1, 1997, and provides that this Code section shall not apply to or affect conduct occurring prior to July 1, 1997.

## CHAPTER 2

### ABATEMENT OF NUISANCES GENERALLY

Sec.		Sec.	
41-2-1.	Authorization and procedure for abatement of nuisances generally.		ture is unfit or vacant, dilapidated, and being used in connection with the commission of drug crimes.
41-2-2.	Filing of petition to abate public nuisance.	41-2-11.	Powers of public officers in regard to unfit buildings or structures.
41-2-3.	Filing of petition to abate private nuisance.	41-2-12.	Service of complaints or orders upon parties in interest and owners of unfit buildings or structures.
41-2-4.	Issuance of injunction where nuisance about to be erected or commenced likely to result in irreparable damage.	41-2-13.	Injunctions against order to repair, close, or demolish unfit buildings or structures.
41-2-5.	Authorization and procedure for abatement of nuisances in cities and unincorporated areas of counties.	41-2-14.	Taking of unfit buildings or structures by eminent domain; police power.
41-2-6.	Notice of meeting to determine question of abatement [Repealed].	41-2-15.	Authority to use revenues, grants, and donations to repair, close, or demolish unfit buildings or structures.
41-2-7.	Power of counties and municipalities to repair, close, or demolish unfit buildings or structures; health hazards on private property; properties affected.	41-2-16.	Construction of Code Sections 41-2-7 through 41-2-17 with county or municipal local enabling Act, charter, and other laws, ordinances, and regulations.
41-2-8.	Definitions for use in Code Sections 41-2-7 through 41-2-17.	41-2-17.	Prior ordinances relating to repair, closing, or demolition of unfit buildings or structures.
41-2-9.	County or municipal ordinances relating to unfit buildings or structures.		
41-2-10.	Determination by public officer that dwelling, building, or struc-		

**Cross references.** — Abatement of nuisances relating to manufacture, sale, etc., of distilled spirits in dry counties and municipalities, § 3-10-8. Institution of action for

injunction, mandamus, etc., to prevent, correct, or abate violation or threatened violation of county building, electrical, etc., codes, § 36-13-10.

### JUDICIAL DECISIONS

**This chapter furnishes a summary remedy for the abatement of nuisances**, public or private, and such remedy should be resorted to unless the facts make it inadequate. *Powell v. Foster*, 59 Ga. 790 (1877); *Broomhead v. Grant*, 83 Ga. 451, 10 S.E. 116 (1889); *Hendricks v. Jackson*, 143 Ga. 106, 84 S.E. 440 (1915); *Simmons v. Lindsay*, 144 Ga. 845, 88 S.E. 199 (1916).

The procedure provided for in this chapter is the proper remedy where the sole relief sought by the plaintiff is the removal of obstructions in a public alley or street placed there by the defendant. *Barnes v. Cheek*, 84 Ga. App. 653, 67 S.E.2d 145 (1951).

**Necessity of actual existence of nuisance.** — This chapter was not intended to afford a remedy against that which is not an actually

existing nuisance, as distinguished from that which may or probably will become such. The language of this section seems to admit of no other construction. *Fairview Cem. Co. v. Wood*, 36 Ga. App. 709, 138 S.E. 88 (1927).

**Cited in** *Haney v. Sheppard*, 207 Ga. 158,

60 S.E.2d 453 (1950); *Atkinson v. Drake*, 212 Ga. 558, 93 S.E.2d 702 (1956); *Speight v. Slaton*, 415 U.S. 333, 94 S. Ct. 1098, 39 L. Ed. 2d 367 (1974); *660 Lindbergh, Inc. v. City of Atlanta*, 492 F. Supp. 511 (N.D. Ga. 1980).

## RESEARCH REFERENCES

**ALR.** — When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 ALR4th 456.

### 41-2-1. Authorization and procedure for abatement of nuisances generally.

Upon filing of a petition as provided in Code Section 41-2-2, any nuisance which tends to the immediate annoyance of the public in general, is manifestly injurious to the public health or safety, or tends greatly to corrupt the manners and morals of the public may be abated by order of a judge of the superior court of the county in which venue is proper. (Laws 1833, Cobb's 1851 Digest, p. 817; Code 1863, § 3995; Code 1868, § 4023; Code 1873, § 4094; Code 1882, § 4094; Civil Code 1895, § 4760; Civil Code 1910, § 5329; Code 1933, § 72-201; Ga. L. 1980, p. 620, § 1; Ga. L. 1981, p. 867, § 1.)

**Cross references.** — Abatement of hazard resulting from abandoned well or hole, § 44-1-14.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION SUFFICIENCY OF ALLEGATIONS

##### General Consideration

**Constitutionality.** — The statutory definition of a nuisance is not vague and indefinite and therefore unconstitutional. *Atlanta Processing Co. v. Brown*, 227 Ga. 203, 179 S.E.2d 752 (1971).

**The section defines an indictable nuisance,** and was evidently intended not to authorize the abatement of an act which was not indictable, but to authorize the abatement of indictable nuisances of peculiar virulence, without waiting for an indictment. *Vason v. South Carolina R.R.*, 42 Ga. 631 (1871).

**Section applicable to public and private nuisance.** — While this section, in terms, provides only for the abatement of a public

nuisance, in the manner therein specified, it has been several times held that a private nuisance may be abated under its operation provided the application is made by the party injured. See *Ruff v. Phillips*, 50 Ga. 130 (1873); *Salter v. Taylor*, 55 Ga. 310 (1875); *Hart v. Taylor*, 61 Ga. 156 (1878); *Holmes v. Jones*, 80 Ga. 659, 7 S.E. 168 (1888); *Savannah, F. & W. Ry. v. Gill*, 118 Ga. 737, 45 S.E. 623 (1903).

**Equitable relief.** — Where the nuisance is continuing in character, the remedy under this section is inadequate, and equity will take jurisdiction and grant relief. *Hunnicut v. Eaton*, 184 Ga. 485, 191 S.E. 919 (1937).

A nuisance may be abated in equity if the hurt or damage is irreparable or continuing.



**General Consideration (Cont'd)**

Isley v. Little, 217 Ga. 586, 124 S.E.2d 80 (1962), later appeal, 219 Ga. 23, 131 S.E.2d 623 (1963).

**Operation of lawful business as a nuisance.** — While mere apprehension of injury and damage is insufficient, where it is made to appear with reasonable certainty that irreparable harm and damage will occur from the operation of an otherwise lawful business amounting to a continuing nuisance, equity will restrain the construction, maintenance or operation of such lawful business. *Isley v. Little*, 217 Ga. 586, 124 S.E.2d 80 (1962), later appeal, 219 Ga. 23, 131 S.E.2d 623 (1963).

**Cited in** *South Carolina R.R. v. Ellis*, 40 Ga. 87 (1869); *Wetter v. Campbell*, 60 Ga. 266 (1878); *Roberts v. Harrison*, 101 Ga. 773, 28 S.E. 995, 65 Am. St. R. 342 (1897); *Western & A.R.R. v. City of Atlanta*, 113 Ga. 537, 38 S.E. 996, 54 L.R.A. 294 (1901); *Cole v. Jones*, 8 Ga. App. 737, 70 S.E. 96 (1911); *Adair v. Spellman Sem.*, 13 Ga. App. 600, 79 S.E. 589 (1913); *Giles v. Rawlings*, 148 Ga. 575, 97 S.E. 521 (1918); *Jones v. City of Atlanta*, 40 Ga. App. 300, 149 S.E. 305 (1929); *De Long v. Kent*, 85 Ga. App. 360, 69 S.E.2d 649 (1952); *Hagins v. Howell*, 219 Ga. 276, 133 S.E.2d 8 (1963); *Sizemore v. Coker*, 220 Ga. 773, 141 S.E.2d 891 (1965).

**Sufficiency of Allegations**

**No presumption of damages.** — Nuisance being an indirect tort, there is no presumption of damages from its maintenance; and the plaintiff, in order to recover must show the fact of the nuisance and consequent damages. *Crane v. Mays*, 70 Ga. App. 66, 27 S.E.2d 347 (1943).

Petition alleging that the plaintiff purchased a described tract of land, and at the same time acquired an easement adjacent thereto over a lane as a means of ingress and egress from the public road to his farm, that he had used this land without interruption since the date it was acquired until the defendant obstructed the same by placing a "cattle gap" across it, that such obstruction had interfered with the plaintiff's movement of cattle along said lane to a pasture, thereby causing the plaintiff much inconvenience, trouble, and injury to his cattle, and thereby depriving his family of necessary milk and food, stated a cause of action for injunctive relief. *Ozbolt v. Miller*, 206 Ga. 558, 57 S.E.2d 601 (1950).

Character of proceeding under this chapter was established by the plaintiff's petition and its contents, and this could not be changed into an action to try title to land by the defense sought to be interposed by the defendant. *Barnes v. Cheek*, 84 Ga. App. 653, 67 S.E.2d 145 (1951).

While petitioners were not entitled to all the relief prayed for, or to an injunction against the operation of the defendant's service station business when conducted in a normal manner accompanied by no more noises than were reasonably necessary, yet they would be entitled to injunctive relief against unusual and unnecessary noises, provided the proof showed that the operation of the business was attended with such unusual and unnecessary noises, as distinguished from those disturbances and noises which were normal and of the character usually attendant upon the operation of the business of operating a filling station and garage for repairs. *Wilson v. Evans Hotel Co.*, 188 Ga. 498, 4 S.E.2d 155 (1939).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, §§ 50-65.

**C.J.S.** — 66 C.J.S., Nuisances, §§ 102, 109, 110.

**ALR.** — Proximate cause as determining landlord's liability, where injury results to a third person from a nuisance that becomes such only upon tenant's using the premises, 4 ALR 740.

Fire escape as an attractive nuisance, 9 ALR 271.

Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of nuisances, or prescribing a pecuniary penalty therefor, 12 ALR 431; 121 ALR 642.

Liability of purchaser of premises for nui-



sance thereon created by predecessor, 14 ALR 1094.

Tannery or curing of hides as a nuisance, or subject of municipal regulation, 32 ALR 1358.

Injunction against games on neighboring property, 62 ALR 782; 32 ALR3d 1127.

Decree abating nuisance as affecting owner not served with process, 63 ALR 698.

Dogs as nuisance, 79 ALR 1060.

Aeroplanes and aeronautics, 99 ALR 173.

Use of property for production of war goods as affecting question of nuisance, and injunction to abate same, 145 ALR 611.

Validity of provision of statute or ordinance that requires vacation of premises which do not comply with building or sanitary regulations, upon notice to that effect, without judicial proceeding, 153 ALR 849.

When statute of limitation commences to run against damage from overflow of land caused by artificial construction or obstruction, 5 ALR2d 302.

Stockyard as a nuisance, 18 ALR2d 1033.

Practice of exacting usury as a nuisance or ground for injunction, 83 ALR2d 848.

Statutes, ordinances, or regulations relating to private residential swimming pools, 92 ALR2d 1283.

Saloons or taverns as nuisance, 5 ALR3d 989.

Modern status of rules as to balance of convenience or social utility as affecting relief from nuisance, 40 ALR3d 601.

Validity and construction of statute or ordinance providing for repair or destruction of residential building by public authorities at owner's expense, 43 ALR3d 916.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

Nuisance: right of one compelled to discontinue business or activity constituting nuisance to indemnity from successful plaintiff, 53 ALR3d 873.

Existence of, and relief from, nuisance created by operation of air conditioning or ventilating equipment, 79 ALR3d 320.

Bells, carillons, and the like, as nuisance, 95 ALR3d 1268.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 ALR4th 603.

Nuisance as entitling owner or occupant of real estate to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in addition to, damages for depreciation in value of property or its use, 25 ALR5th 568.

## 41-2-2. Filing of petition to abate public nuisance.

Private citizens may not generally interfere to have a public nuisance abated. A petition must be filed by the district attorney on behalf of the public. However, a public nuisance may be abated upon filing of a petition by any private citizen specially injured. (Orig. Code 1863, § 3999; Code 1868, § 4027; Code 1873, § 4098; Code 1882, § 4098; Civil Code 1895, §§ 4761, 4766; Civil Code 1910, §§ 5330, 5338; Code 1933, § 72-202; Ga. L. 1980, p. 620, § 2.)

**Law reviews.** — For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978).

For note, "Town of Fort Oglethorpe v.

Phillips: A Clarification of Georgia's Public Nuisance Law?," see 5 Ga. St. B.J. 474 (1969). For note discussing the abatement of nonconforming uses as nuisances, see 10 Ga. St. B.J. 302 (1973).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION  
AUTHORITY OF DISTRICT ATTORNEY  
JURISDICTION

### General Consideration

**Actions by private citizens require special injury.** — Private citizens cannot generally interfere to have a public nuisance enjoined under this section. *Sammons v. Sturgis*, 145 Ga. 663, 89 S.E. 774 (1916).

While generally a private citizen may not have a public nuisance enjoined, such nuisance may be abated, on the application of a citizen specially injured. *Harbuck v. Richland Box Co.*, 204 Ga. 352, 49 S.E.2d 883 (1948).

Generally a public nuisance gives to any individual no right of action for injunction, but it must be abated by a process instituted in the name of the state. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

The private citizen specially damaged by a public nuisance may proceed in his own name and behalf to have the same abated under this section and § 41-2-3. *Savannah, F. & W. Ry. v. Gill*, 118 Ga. 737, 45 S.E. 623 (1903); *Trust Co. v. Ray*, 125 Ga. 485, 54 S.E. 145 (1906).

All injury to health is special, and necessarily limited in its effect to the individual affected, and is, in its nature, irreparable. It matters not that others within the sphere of the operation of the nuisance, whether public or private, may be affected likewise. *Hunnicut v. Eaton*, 184 Ga. 485, 191 S.E. 919 (1937).

Allegations of petition in which petitioners sought equitable relief "as individuals, citizens, and taxpayers" from the closing of a railroad crossing were insufficient to show special damage to petitioners, or any damage not shared equally by all other "individuals, citizens, and taxpayers," and the petition was therefore insufficient for the grant of any relief to the petitioners as individuals, citizens, and taxpayers. *State Hwy. Dep't v. Reed*, 211 Ga. 197, 84 S.E.2d 561 (1954).

If operation of a picture show on the Sabbath amounts to a public nuisance, such nuisance may be abated in the manner provided by law, or it may be enjoined upon an information filed by the solicitor general (now district attorney), but an injunction will not be granted at the instance of a private citizen unless he has sustained special injury. *American Legion v. Miller*, 183 Ga. 754, 189 S.E. 837 (1937); *Crane v. Mays*, 70 Ga. App. 66, 27 S.E.2d 347 (1943).

*Cited in Coast Line R.R. v. Cohen*, 50 Ga. 451 (1873); *Ison v. Manley*, 76 Ga. 804 (1886); *Western & A.R.R. v. City of Atlanta*, 113 Ga. 537, 38 S.E. 996, 54 L.R.A. 294 (1901); *Peginis v. City of Atlanta*, 132 Ga. 302, 63 S.E. 857, 35 L.R.A. (n.s.) 716 (1909); *Aiken v. Armistead*, 186 Ga. 368, 198 S.E. 237 (1938); *Poole v. Arnold*, 187 Ga. 734, 2 S.E.2d 83 (1939); *Nichols v. Pirkle*, 202 Ga. 372, 43 S.E.2d 306 (1947); *Kilgore v. Paschall*, 202 Ga. 416, 43 S.E.2d 520 (1947); *De Long v. Kent*, 85 Ga. App. 360, 69 S.E.2d 649 (1952); *Malcom v. Webb*, 211 Ga. 449, 86 S.E.2d 489 (1955); *City of Dublin v. Hobbs*, 218 Ga. 108, 126 S.E.2d 655 (1962); *Burgess v. Johnson*, 223 Ga. 427, 156 S.E.2d 78 (1967); *Ungar v. Mayor of Savannah*, 224 Ga. 613, 163 S.E.2d 814 (1968); *J.D. Jewell, Inc. v. State ex rel. Hancock*, 227 Ga. 336, 180 S.E.2d 704 (1971); *Sanders v. McAuliffe*, 364 F. Supp. 654 (N.D. Ga. 1973); *Brock v. Hall County*, 239 Ga. 160, 236 S.E.2d 90 (1977); *Stephens v. Tate*, 147 Ga. App. 366, 249 S.E.2d 92 (1978); *Brand v. Wilson*, 252 Ga. 416, 314 S.E.2d 192 (1984).

### Authority of District Attorney

**Acting on information of citizens.** — A lewd house being per se a public nuisance, a court of equity has jurisdiction to abate the same on a suit brought by the district attorney on the information of a citizen as a relator, without alleging or proving special injury to property. *Edison v. Ramsey*, 146 Ga. 767, 92 S.E. 513 (1917).

The district attorney is not authorized to act on the information of citizens, except in case of a public nuisance. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

In order for a solicitor general (now district attorney) to proceed for the public, on information filed with him by citizens, to enjoin a nuisance under this section, the object which it is sought to enjoin must be a public nuisance. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

**Complaint must name citizen furnishing information.** — A court of equity will not entertain a bill in the name of one or more private citizens to restrain a public nuisance, no private injury or threatened injury being alleged to such citizens or to their property. In such a case, the nuisance being a purely

public one, can only be restrained by the public, on information filed by a public officer, to wit: by the solicitor general (now district attorney) for the Circuit. This holding is declaratory of the common-law rule which is universally adopted and quite uniform. *Mayor of Columbus v. Jaques*, 30 Ga. 506 (1860).

A complaint in equity filed by the district attorney under this section to abate a public nuisance must name the citizen or citizens upon whose information the complaint is based. *Chancey v. Hancock*, 233 Ga. 734, 213 S.E.2d 633 (1975).

**Authority not repealed by Air Quality Control Act.** — The authority granted to district attorneys under this section to abate public nuisances relating to air pollution was not repealed to any extent by the former Georgia Air Quality Control Act. *J.D. Jewell, Inc. v. Hancock*, 226 Ga. 480, 175 S.E.2d 847 (1970).

### Jurisdiction

**Jurisdiction by court of equity to grant**

**injunction.** — A court of equity has jurisdiction and in a proper case will, by injunction, restrain a public nuisance. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

A court of equity has jurisdiction, and in a proper case may by injunction restrain a public nuisance upon information filed by the solicitor general (now district attorney). *Gullatt v. State ex rel. Collins*, 169 Ga. 538, 150 S.E. 825 (1929).

Equity, generally, will not interfere with the administration of the criminal law. The state, however, has an interest in the welfare, peace, and good order of its citizens and communities and has provided in its laws for the abatement of nuisances when the public generally is injured. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

By clear and necessary implication injunction will lie in the name of the state to enjoin a public nuisance. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, §§ 254, 259, 260, 267, 268, 431, 433, 435.

**C.J.S.** — 43 C.J.S., Injunctions, § 26. 66 C.J.S., Nuisances, §§ 77-79.

**ALR.** — Injunction to prevent establishment or maintenance of garbage or sewage disposal plant, 5 ALR 920; 47 ALR 1154.

Special injury to property interest as condition of right to enjoin diversion of dedicated property, 41 ALR 1410.

Animal rendering or bone-boiling plant or business as nuisance, 17 ALR2d 1269.

Public dances or dance halls as nuisances, 44 ALR2d 1381.

Statutes, ordinances, or regulations relating to private residential swimming pools, 92 ALR2d 1283.

Saloons or taverns as nuisance, 5 ALR3d 989.

Water distributor's liability for injuries due to condition of service lines, meters, and the like, which serve individual consumer, 20 ALR3d 1363.

Liability in connection with fire or explosion of explosives while being stored or transported, 35 ALR3d 1177.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility, 42 ALR3d 426.

Public swimming pool as nuisance, 49 ALR3d 652.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 ALR3d 665.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Existence of, and relief from, nuisance created by operation of air conditioning or ventilating equipment, 79 ALR3d 320.

Carwash as nuisance, 4 ALR4th 1308.



**41-2-3. Filing of petition to abate private nuisance.**

A private nuisance may be abated upon filing of a petition by the person injured. (Orig. Code 1863, § 3999; Code 1868, § 4027; Code 1873, § 4098; Code 1882, § 4098; Civil Code 1895, § 4766; Civil Code 1910, § 5338; Code 1933, § 72-203; Ga. L. 1980, p. 620, § 3.)

**JUDICIAL DECISIONS****ANALYSIS****GENERAL CONSIDERATION  
STATUTE OF LIMITATIONS****General Consideration**

**Cited in** Lockwood v. Daniel, 193 Ga. 122, 17 S.E.2d 542 (1941); De Long v. Kent, 85 Ga. App. 360, 69 S.E.2d 649 (1952); Clark v. Baety, 216 Ga. 42, 114 S.E.2d 527 (1960).

**Statute of Limitations**

**Statute of limitations not a bar to equitable relief.** — Plaintiff's right to equitable

relief was not barred by the statute of limitations on grounds that the nuisance complained of had existed for a period of more than four years prior to the institution of litigation, since where there is a continuing nuisance, a new cause of action arises daily and a court of equity takes jurisdiction in such a case to avoid a multiplicity of suits. Scott v. Dudley, 214 Ga. 363, 105 S.E.2d 752 (1958).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, §§ 254, 255, 259, 268, 431-435.

**C.J.S.** — 66 C.J.S., Nuisances, § 81.

**ALR.** — Ice manufacturing or distributing plant as nuisance, 41 ALR 626.

Injunction against games on neighboring property, 62 ALR 782; 32 ALR3d 1127.

Casting of light on another's premises as constituting actionable wrong, 5 ALR2d 705; 79 ALR3d 253.

Public dances or dance halls as nuisances, 44 ALR2d 1381.

Propriety of injunctive relief against diversion of water by municipal corporation or

public utility, 42 ALR3d 426.

Residential swimming pool as nuisance, 49 ALR3d 545.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Operation of cement plant as nuisance, 82 ALR3d 1004.

Funeral home as private nuisance, 8 ALR4th 324.

**41-2-4. Issuance of injunction where nuisance about to be erected or commenced likely to result in irreparable damage.**

Where the consequence of a nuisance about to be erected or commenced will be irreparable damage and such consequence is not merely possible but to a reasonable degree certain, an injunction may be issued to restrain the nuisance before it is completed. (Orig. Code 1863, § 2944; Code 1868, § 2951; Code 1873, § 3002; Code 1882, § 3002; Civil Code 1895, § 3863; Civil Code 1910, § 4459; Code 1933, § 72-204; Ga. L. 1980, p. 620, § 4.)



**Law reviews.** — For note discussing the abatement of nonconforming uses as nuisances, see 10 Ga. St. B.J. 302 (1973).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### BASIS OF INJUNCTION

#### JURISDICTION

#### ORDER OF ABATEMENT

### General Consideration

**Injunction will lie in name of state.** — By clear and necessary implication injunction will lie in the name of the state to enjoin a public nuisance. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

Generally, a public nuisance gives to any individual no right of action for injunction, but it must be abated by a process instituted in the name of the state. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

**Cited in** *Mygatt v. Goetchins*, 20 Ga. 350 (1856); *Sullivan, Cabot & Co. v. Rome R.R.*, 28 Ga. 29 (1859); *Kirtland v. Mayor of Macon*, 66 Ga. 385 (1881); *Wingate v. City of Doerun*, 177 Ga. 373, 170 S.E. 226 (1933); *Vaughn v. Burnette*, 211 Ga. 206, 84 S.E.2d 568 (1954).

### Basis of Injunction

**Nuisance must be certain.** — It is only where it is made to appear with reasonable certainty that an instrumentality in the course of construction will necessarily constitute a nuisance that a court of equity will exercise the power to restrain. *Elder v. City of Winder*, 201 Ga. 511, 40 S.E.2d 659 (1946).

A court of equity will only exercise the power to restrain the erection of a building, and the maintenance therein, after construction, of a lawful business, on the ground that the operation of such business will constitute a nuisance, where it is made to appear with reasonable certainty that such operation necessarily constitutes a nuisance, the consequences of which will be irreparable in damages. *Powell v. Garmany*, 208 Ga. 550, 67 S.E.2d 781 (1951).

**Where the injury is either irreparable or continuing**, an injunction will be granted. *Farley v. Gate City Gas Light Co.*, 105 Ga. 323, 31 S.E. 193 (1898).

An injunction will be granted where the damages can be ascertained, and all rights finally adjudicated in one action. *Wheeler v. Steele*, 50 Ga. 24 (1873); *Powell v. Foster*, 59 Ga. 790 (1877).

A continuing nuisance gives a new cause of action for each day of its continued maintenance, and in such a case, in order to avoid a multiplicity of suits, a court of equity will entertain jurisdiction to enjoin the nuisance and also have it abated. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

A nuisance may be abated in equity if the hurt or damage is irreparable or continuing. *Isley v. Little*, 217 Ga. 586, 124 S.E.2d 80 (1962), later appeal, 219 Ga. 23, 131 S.E.2d 623 (1963).

A nuisance per accidens by reason of circumstances and surroundings may be abated in equity if the hurt or damage is irreparable or continuing. *Camp v. Warrington*, 227 Ga. 674, 182 S.E.2d 419 (1971).

**Evidence obtained by illegal search or seizure.** — Where the evidence in support of injunctions to abate a public nuisance is obtained by illegal searches and seizures, the portions of the judgments granting such injunctions are void. *Carson v. State ex rel. Price*, 221 Ga. 299, 144 S.E.2d 384 (1965).

**Exclusion of opinion evidence of nonexperts.** — The method of taking testimony, when an injunction has been applied for, is found in Part 2, Art. 2, Ch. 10, T. 24; however, opinion evidence of nonexperts will be excluded. *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S.E. 1126 (1910).

**Mere apprehension of injury and damage.** — Allegation of "mere speculative or contingent injuries, with nothing to show that they will in fact happen," will not support a

**Basis of Injunction (Cont'd)**

prayer to enjoin a nuisance. *Harrison v. Brooks*, 20 Ga. 537 (1856); *Bailey v. Ross*, 68 Ga. 735 (1882); *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S.E. 1126 (1910); *Elder v. City of Winder*, 201 Ga. 511, 40 S.E.2d 659 (1946).

Allegations of mere speculative or contingent injuries, with nothing to show that in fact they will happen, are insufficient to support a prayer for injunctive relief. *Powell v. Garmany*, 208 Ga. 550, 67 S.E.2d 781 (1951).

A mere apprehension of injury, based on the assumption that a lawful business not then in operation will be operated in the future in an improper manner, so as to become a nuisance, is not sufficient to authorize equity to enjoin the erection of a building wherein such business is to be carried on. *Powell v. Garmany*, 208 Ga. 550, 67 S.E.2d 781 (1951).

Mere apprehension of irreparable injury from an alleged nuisance, consisting of a house in course of construction for a lawful business use, is not sufficient to authorize an injunction. If it be a nuisance, the consequences must be to a reasonable degree certain. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

The mere anticipation of injury from the operation of a lawful business will not authorize the grant of an injunction. *Davis v. Miller*, 212 Ga. 836, 96 S.E.2d 498 (1957).

Mere apprehension of irreparable injury from an alleged nuisance consisting of a house in the course of construction or alteration for a lawful business is not sufficient to authorize an injunction. *Roberts v. Rich*, 200 Ga. 497, 37 S.E.2d 401 (1946).

While mere apprehension of injury and damage is insufficient, where it is made to appear with reasonable certainty that irreparable harm and damage will occur from the operation of an otherwise lawful business amounting to a continuing nuisance, equity will restrain the construction, maintenance or operation of such lawful business. *Isley v. Little*, 217 Ga. 586, 124 S.E.2d 80 (1962), later appeal, 219 Ga. 23, 131 S.E.2d 623 (1963); *Camp v. Warrington*, 227 Ga. 674, 182 S.E.2d 419 (1971).

Fears of abutting landowners that land condemned for use as a football stadium

would become a nuisance were too speculative to permit the enjoining of the condemnation. *Herren v. Board of Educ.*, 219 Ga. 431, 134 S.E.2d 6 (1963).

Where a petition fails to show the facts from which it appears with reasonable certainty that the operation of the business will work hurt, inconvenience and damage, it falls just short of alleging a nuisance per accidens against which an injunction should be granted. *Griffith v. Newman*, 217 Ga. 533, 123 S.E.2d 723 (1962).

**Granting and dissolution of injunctions.**

— Under this section an interlocutory injunction may be granted against the establishment of business, until the final trial of the case before the jury. *Morrison v. Slappey*, 153 Ga. 724, 113 S.E. 82 (1922).

**Use of restraining order.** — And while an injunction which is purely mandatory in its nature cannot be granted, the court may grant an order the essential nature of which is to restrain, although in yielding obedience to the restrain the defendant may incidentally be compelled to perform some act. *Central of Ga. Ry. v. Americus Constr. Co.*, 133 Ga. 392, 65 S.E. 855 (1909).

**Injunction granted enjoining escape of gases from a city sewer.** — See *Central of Ga. Ry. v. Americus Constr. Co.*, 133 Ga. 392, 65 S.E. 855 (1909).

**Unlicensed obstruction of public street.**

— See *Savannah, A. & G.R.R. v. Shields*, 33 Ga. 601 (1863).

**Dumping trash on another's land.** — See *Lowe v. Holbrook*, 71 Ga. 563 (1883); *Butler v. Mayor of Thomasville*, 74 Ga. 570 (1885).

**Obstruction of an alley.** — See *Murphey v. Harker*, 115 Ga. 77, 41 S.E. 585 (1902).

**Diversion of a watercourse.** — See *Persons v. Hill*, 33 Ga. 141 (1864).

**Municipal license of cars in its street for private use.** — See *Mayor of Macon v. Harris*, 73 Ga. 428 (1884).

**Construction of a pond.** — See *De Vaughn v. Minor*, 77 Ga. 809, 1 S.E. 433 (1887).

**Maintaining livery stable.** — See *Coker v. Birge*, 10 Ga. 336 (1851). But see *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. R. 505 (1882).

**Operation of poultry houses.** — See *May v. Brueshaber*, 265 Ga. 889, 466 S.E.2d 196 (1995).

**Grocery business in residential area.** — It was not error for a trial court to dismiss a

petition complaining that a proposed warehouse and wholesale grocery business in a residential section would constitute a nuisance, causing irreparable damage to the plaintiffs, and seeking an injunction to restrain the construction of the proposed building, because such a business is not necessarily a nuisance per se, even in a residential neighborhood, and mere apprehension of irreparable injury is insufficient under this section. *Roberts v. Rich*, 200 Ga. 497, 37 S.E.2d 401 (1946).

**Effect of abatement of nuisance before trial.** — Where subsequently to the institution of the action, but prior to the trial, the defendant has practically abated the nuisance, a refusal to grant an injunction under this section is proper. *Farley v. Gate City Gas Light Co.*, 105 Ga. 323, 31 S.E. 193 (1898).

### Jurisdiction

**A court of equity has jurisdiction** and in a proper case will, by injunction, restrain a public nuisance. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

**Prospective or future damages not recoverable.** — Equity courts have the power to

abate nuisances, but, where the nuisance complained of is merely temporary, then prospective or future damages, as damages for permanent injury, are not recoverable. *Ward v. Southern Brighton Mills*, 45 Ga. App. 262, 164 S.E. 214 (1932).

Equity, generally, will not interfere with the administration of the criminal law. The state, however, has an interest in the welfare, peace, and good order of its citizens and communities and has provided in its laws for the abatement of nuisances when the public generally is injured. *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930).

### Order of Abatement

**Sufficiency of order.** — An order restraining the defendant from permitting any gases or vapors to escape from, or be carried beyond, the ground owned by the defendant company and upon which its plant is located, so as to constitute a nuisance, as defined in § 41-1-1 and this section is sufficiently specific. *Morris Fertilizer Co. v. Boykin*, 149 Ga. 673, 101 S.E. 799 (1920).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 42 Am. Jur. 2d, Injunctions, §§ 48, 49, 265. 58 Am. Jur. 2d, Nuisances, §§ 329-336, 396.

**C.J.S.** — 43 C.J.S., Injunctions, §§ 16, 17, 20-28. 66 C.J.S., Nuisances, §§ 111-118.

**ALR.** — Injunction to prevent establishment or maintenance of garbage or sewage disposal plant, 5 ALR 920; 47 ALR 1154.

Nuisance resulting from smoke alone as subject for injunctive relief, 6 ALR 1575.

Right to enjoin threatened or anticipated nuisance, 26 ALR 937; 32 ALR 724; 55 ALR 880.

Institution for the punishment or rehabilitation of criminals, delinquents, or alcoholics as enjoined nuisance, 21 ALR3d 1058.

Punitive damages in actions based on nuisance, 31 ALR3d 1346.

Operation of cement plant as nuisance, 82 ALR3d 1004.

## 41-2-5. Authorization and procedure for abatement of nuisances in cities and unincorporated areas of counties.

If the existence of a nuisance is complained of in a county or city of this state, the municipal court of the city, if the nuisance complained of is in the city, shall have jurisdiction to hear and determine the question of the existence of such nuisance and, if found to exist, to order its abatement. If the nuisance complained of is located in the unincorporated area of a county, the magistrate court of the county, unless otherwise provided by local law, shall have such jurisdiction and power to order its abatement. (Laws 1833, Cobb's 1851 Digest, p. 817; Code 1863, § 3996; Code 1868,



§ 4024; Code 1873, § 4095; Code 1882, § 4095; Ga. L. 1892, p. 64, § 1; Civil Code 1895, § 4762; Civil Code 1910, § 5331; Code 1933, § 72-401; Ga. L. 1981, p. 1739, § 1; Ga. L. 1987, p. 3, § 41; Ga. L. 1988, p. 1419, § 1.)

**Cross references.** — Content of municipal or county ordinances relating to repair, closing, or demolition of dwellings unfit for human habitation, § 36-61-11.

**Law reviews.** — For article, "Delegation in Georgia Local Government Law," see 7 Ga.

St. B.J. 9 (1970). For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### NOTICE

#### DELEGATION OF POWER TO ABATE NUISANCES

##### JURISDICTION

##### PLEADING AND PRACTICE

### General Consideration

**It is an exercise of judicial power**, to determine what is by law a nuisance and only those things which are by the common or statute law declared to be nuisances per se, or which in their very nature are such, may be summarily suppressed. *City of Atlanta v. Aycock*, 205 Ga. 441, 53 S.E.2d 744 (1949).

**Mere apprehension of injury.** — This section does not apply where there is a mere apprehension of an irreparable injury. *Wingate v. City of Doerun*, 177 Ga. 373, 170 S.E. 226 (1933).

**Any nuisance injurious to the public health is within the terms of this section.** *Strong v. LaGrange Mills*, 112 Ga. 117, 37 S.E. 117 (1900); *Western & A.R.R. v. City of Atlanta*, 113 Ga. 537, 38 S.E. 996, 54 L.R.A. 294 (1901); *Peginis v. City of Atlanta*, 132 Ga. 302, 63 S.E. 857, 35 L.R.A. (n.s.) 716 (1909); *Griggs v. City of Macon*, 154 Ga. 519, 114 S.E. 899 (1922).

**Proceedings in name of city upon application of citizen.** — If the nuisance is a public one merely, and no private individual suffered special damages therefrom, then the proceedings to abate the same should be in the name of the city upon the application of some citizen. *Calhoun ex rel. Chapman v. Gulf Oil Corp.*, 189 Ga. 414, 5 S.E.2d 902 (1939).

**Cited in** *Spencer v. Tumlin*, 155 Ga. 341, 116 S.E. 600 (1923); *City Council v. Sanders*, 164 Ga. 235, 138 S.E. 234 (1927); *Jones v.*

*City of Atlanta*, 40 Ga. App. 300, 149 S.E. 305 (1929); *Albany Theater, Inc. v. Short*, 171 Ga. 57, 154 S.E. 895 (1930); *O'Quinn v. Mayor of Homerville*, 42 Ga. App. 628, 157 S.E. 109 (1931); *American Legion v. Miller*, 183 Ga. 754, 189 S.E. 837 (1937); *Lockwood v. Daniel*, 193 Ga. 122, 17 S.E.2d 542 (1941); *Foster v. Mayor of Carrollton*, 68 Ga. App. 796, 24 S.E.2d 143 (1943); *De Long v. Kent*, 85 Ga. App. 360, 69 S.E.2d 649 (1952); *Johnson v. Willingham*, 212 Ga. 310, 92 S.E.2d 1 (1956); *Neel v. Clark*, 221 Ga. 439, 145 S.E.2d 235 (1965); *Cronic v. State*, 222 Ga. 623, 151 S.E.2d 448 (1966); *Shaffer v. City of Atlanta*, 223 Ga. 249, 154 S.E.2d 241 (1967); *Fulton County v. Woodside*, 223 Ga. 316, 155 S.E.2d 404 (1967); *Ford v. Crawford*, 240 Ga. 612, 241 S.E.2d 829 (1978); *Yield, Inc. v. City of Atlanta*, 152 Ga. App. 171, 262 S.E.2d 481 (1979); 660 *Lindbergh, Inc. v. City of Atlanta*, 492 F. Supp. 511 (N.D. Ga. 1980).

### Notice

**Building inspector not authorized to substitute his judgment.** — Under the general law of this state, this section, the building inspector of the City of Atlanta was not authorized to substitute his judgment for that of the tribunal fixed by law, and serve notices on the property owners that their property "constitutes a nuisance," or that it had been "condemned." *City of Atlanta v. Aycock*, 205 Ga. 441, 53 S.E.2d 744 (1949).



**Reasonable notice of hearing on abatement.** — Reasonable notice to the property owner of the time and place of hearing must precede any judgment ordering the abatement (destruction) of private property as a nuisance. *City of Atlanta v. Aycock*, 205 Ga. 441, 53 S.E.2d 744 (1949).

#### **Delegation of Power to Abate Nuisances**

**Lawful delegation of police power to abate nuisances.** — A city's agreement to cooperate with its local housing authority in effecting elimination of unsafe or insanitary dwellings with the approval of the United States Public Housing Administration does not contemplate or provide for an unlawful delegation of its police power to abate nuisances to the public housing administration but amounts only to an assurance of a proper exercise of it by the city to the end that it will do what it ought in any event to do, namely, eliminate unsafe or insanitary dwellings in the interest of general welfare, as it alone can lawfully do. *Telford v. City of Gainesville*, 208 Ga. 56, 65 S.E.2d 246 (1951).

#### **Jurisdiction**

**Jurisdiction generally.** — This section gives no power to justices of the peace (now magistrates); power is vested in the city government alone. *South Carolina R.R. v. Ells*, 40 Ga. 87 (1869).

The part of the section (formerly) relating to jurisdiction in cities of twenty thousand inhabitants confers such jurisdiction in the police court alone of the city where the nuisance exists, except in cases of nuisance per se. *Western & A.R.R. v. City of Atlanta*, 113 Ga. 537, 38 S.E. 996, 54 L.R.A. 294 (1901); *Peginis v. City of Atlanta*, 132 Ga. 302, 63 S.E. 857, 35 L.R.A. (n.s.) 716 (1909).

**Filing abatement proceedings with municipal authorities.** — Proceedings to abate a nuisance, public or private, alleged to exist within an incorporated municipality, must be filed with and determined by the municipal authorities, unless there are special circumstances, requiring the intervention of equity. *Waller v. Lanier*, 198 Ga. 64, 30 S.E.2d 925 (1944); *Mitchell v. Green*, 201 Ga. 256, 39 S.E.2d 696 (1946).

**Section provides adequate remedy.** — This section provides an adequate remedy

for the abatement of a nuisance, public or private, which has been created and which exists within the limits of a town or city, and that remedy must be resorted to for its abatement, unless there are special facts which make the remedy inadequate. *City of East Point v. Henry Chanin Corp.*, 210 Ga. 628, 81 S.E.2d 812 (1954).

To abate a nuisance, public or private, the remedy provided in this section should be resorted to, unless the special facts make the remedy inadequate. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

**Plaintiff must apply to city recorder for order abating nuisance.** — Where the city responsible for an alleged nuisance (formerly) had a population of more than 20,000, the plaintiff was by this section required to apply to the city's recorder for an order abating the nuisance complained of. *City of East Point v. Henry Chanin Corp.*, 210 Ga. 628, 81 S.E.2d 812 (1954).

**Review of recorder's decision by certiorari in superior court.** — Any decision rendered by city's recorder under this section had to be reviewed by certiorari in the superior court. *City of East Point v. Henry Chanin Corp.*, 210 Ga. 628, 81 S.E.2d 812 (1954).

**Writ of prohibition properly denied.** — Where *City of Atlanta* brought a proceeding in recorder's court to abate a nuisance, the penal features of the proceeding being abandoned, and defendant sued out in the superior court a petition for the writ of prohibition to prevent the recorder from proceeding with the case, the writ was properly denied, the writ of prohibition is never granted where there is any other legal remedy, and this section provided an adequate and complete remedy in the case. *Magbee v. City of Atlanta*, 180 Ga. 733, 180 S.E. 485 (1935).

**Availability of certiorari.** — A decision by the governing body of a municipality as to whether alleged acts constitute a nuisance, made after trial in which the parties at interest have participated, is a judicial determination, from which certiorari will lie. *Attaway v. Coleman*, 213 Ga. 329, 99 S.E.2d 154 (1957).

**City criminal court empowered to abate continuing nuisance.** — The fact that the General Assembly made the continuation of a nuisance after notice to abate a misde-

**Jurisdiction (Cont'd)**

meanor (§ 41-1-6), does not preclude the criminal court of Cordele's power to abate nuisances pursuant to the legislative authorization in this section, and its power to enforce its judgments by contempt pursuant to the legislative authorization in the city charter. *Horne v. City of Cordele*, 254 Ga. 346, 329 S.E.2d 134 (1985).

**Proceedings not criminal in nature.** — A proceeding in municipal court to determine the question of whether a nuisance exists is not criminal or quasi criminal in nature since the court cannot fine or imprison the defendant in error, and the bond required for certiorari is that provided for in § 5-4-5 for civil proceedings, and a bond under § 5-4-20 will not suffice. *City of Atlanta v. Pazol*, 95 Ga. App. 598, 98 S.E.2d 216 (1957).

**Equitable jurisdiction.** — Where a municipal corporation itself is maintaining a nuisance, and a proper case exists for its abatement, equity will take jurisdiction, notwithstanding the provisions of this section, which prescribe the manner of abatement when the nuisance complained of shall exist in an incorporated town or city. *City of Blue Ridge v. Kiker*, 189 Ga. 717, 7 S.E.2d 237 (1940).

In situations where there is a continuing nuisance, this section does not afford an adequate remedy at law and a court of equity will entertain jurisdiction to enjoin the nuisance and have it abated. *City of Atlanta v. Wolcott*, 240 Ga. 244, 240 S.E.2d 83 (1977).

Where there is a continuing nuisance, which plaintiffs allege will cause sickness, the remedy provided under this section does not furnish an ample and complete remedy for the plaintiffs. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Although a nuisance exists in a city under the government of a mayor or common council, a court of equity will in a proper case take jurisdiction of a suit to enjoin its continuance, notwithstanding the provisions of this section, when the nuisance is a continuing one. *State ex rel. Boykin v. Ball Inv. Co.*, 191 Ga. 382, 12 S.E.2d 574 (1940); *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

If alleged conduct constitutes a continuing nuisance under § 41-1-1, the plaintiff is entitled to equitable relief. *Poultryland, Inc.*

*v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Since a continuing nuisance was alleged, and since a continuing nuisance may be enjoined by a court of equity it was not error for the trial court to overrule the plea to the jurisdiction, wherein it was asserted that, by virtue of this section the mayor and city council of Springfield had jurisdiction to abate a nuisance in the form of a previously erected obstruction to a private way within the corporate limits of a city of less than 20,000 population. *Rahn v. Pittman*, 216 Ga. 523, 118 S.E.2d 85 (1961).

A petition alleging that a nuisance was a continuing one and injuriously affected the comfort and health of the petitioners in described particulars, and alleging that unless enjoined would cause irreparable damage to petitioners and result in a multiplicity of suits, was not subject to the ground of demurrer that it showed on its face that the petitioners had an adequate remedy at law. *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 37 S.E.2d 785 (1946).

Equity will take jurisdiction when the majority of council are disqualified. *Hill v. McBurney Oil & Fertilizer Co.*, 112 Ga. 788, 38 S.E. 42, 52 L.R.A. 398 (1901).

**No conversion to equitable proceeding by use of evidentiary standard.** — Where a party elects to proceed under this section, it is an action at law and using the evidentiary standard contained in § 41-3-1 does not convert the proceeding into an equitable one. *Yield, Inc. v. City of Atlanta*, 145 Ga. App. 172, 244 S.E.2d 32, cert. dismissed, 241 Ga. 593, 247 S.E.2d 764 (1978).

**Pleading and Practice**

**It is an action at law** where a party elects to proceed under this section. *Yield, Inc. v. City of Atlanta*, 239 Ga. 578, 238 S.E.2d 351 (1977).

**Certiorari and not prohibition is the remedy** by which officers should be forced to follow this section. *Mayor of Montezuma v. Minor*, 70 Ga. 191 (1883).

**Failure to include the municipality as a party is not ground for dismissal.** See *Trust Co. v. Ray*, 125 Ga. 485, 54 S.E. 145 (1906).

**This section does not confer authority to impose a fine.** *Healey v. City of Atlanta*, 125 Ga. 736, 54 S.E. 749 (1906).

### OPINIONS OF THE ATTORNEY GENERAL

**Determination of substandard buildings as nuisance.** — If substandard buildings in a town or city are alleged to be a nuisance, this may be determined in accordance with this section; this determination must be made subject to the due process provisions of state and federal Constitutions; if a nuisance is found to exist, the court can order its abate-

ment; if the property owner fails to abate the nuisance, he may be bound over to a court having jurisdiction of misdemeanors; the municipality cannot itself demolish the offending buildings unless it condemns the property and compensates the owner. 1970 Op. Att'y Gen. No. U70-229.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Political Subdivisions, §§ 443-446. 58 Am. Jur. 2d, Nuisances, §§ 36, 62, 403, 404, 425, 426.

**C.J.S.** — 62 C.J.S., Municipal Corporations, § 281.

**ALR.** — Tannery or curing of hides as a nuisance, or subject of municipal regulation, 32 ALR 1358.

Validity of municipal ordinance prohibiting or regulating keeping of livestock, 32 ALR 1372; 40 ALR 566.

Right of abutting owner to complain of misuse of public park or violation of rights or easements appurtenant thereto, 60 ALR 770.

Right, as between state and county or municipality, to maintain action to abate a public nuisance in a street or highway, 65 ALR 699.

Validity, construction, and application of statute or ordinance declaring plant or es-

tablishment which emits offensive odors to be a public nuisance, 141 ALR 285.

Validity of provision of statute or ordinance that requires vacation of premises which do not comply with building or sanitary regulations, upon notice to that effect, without judicial proceeding, 153 ALR 849.

Landowner's or occupant's liability in damages for escape, without negligence, of harmful gases or fumes from premises, 54 ALR2d 764; 2 ALR4th 1054.

Dairy, creamery, or milk distributing plant, as nuisance, 92 ALR2d 974.

Statutes, ordinances, or regulations relating to private residential swimming pools, 92 ALR2d 1283.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

Recovery in trespass for injury to land caused by airborne pollutants, 2 ALR4th 1054.

### 41-2-6. Notice of meeting to determine question of abatement.

Repealed by Ga. L. 1981, p. 1739, § 1, effective April 17, 1981.

**Editor's notes.** — This Code section was based on Laws 1833, Cobb's 1851 Digest, p. 817; Code 1863, § 3997; Code 1868, § 4025;

Code 1873, § 4096; Code 1882, § 4096; Civil Code 1895, § 4763; Civil Code 1910, § 5332; Code 1933, § 72-402.

### 41-2-7. Power of counties and municipalities to repair, close, or demolish unfit buildings or structures; health hazards on private property; properties affected.

(a) It is found and declared that in the counties and municipalities of this state there is the existence or occupancy of dwellings or other buildings or structures which are unfit for human habitation or for commercial, industrial, or business occupancy or use and are inimical to the welfare and are dangerous and injurious to the health, safety, and welfare of the people



of this state; and that a public necessity exists for the repair, closing, or demolition of such dwellings, buildings, or structures. It is found and declared that in the counties and municipalities of this state where there is in existence a condition or use of real estate which renders adjacent real estate unsafe or inimical to safe human habitation, such use is dangerous and injurious to the health, safety, and welfare of the people of this state and a public necessity exists for the repair of such condition or the cessation of such use which renders the adjacent real estate unsafe or inimical to safe human habitation. Whenever the governing authority of any county or municipality of this state finds that there exist in such county or municipality dwellings, buildings, or structures which are unfit for human habitation or for commercial, industrial, or business uses due to dilapidation and defects increasing the hazards of fire, accidents, or other calamities; lack of adequate ventilation, light, or sanitary facilities; or other conditions rendering such dwellings, buildings, or structures unsafe or unsanitary, or dangerous or detrimental to the health, safety, or welfare, or otherwise inimical to the welfare of the residents of such county or municipality, or vacant, dilapidated dwellings, buildings, or structures in which drug crimes are being committed, power is conferred upon such county or municipality to exercise its police power to repair, close, or demolish the aforesaid dwellings, buildings, or structures in the manner provided in this Code section and Code Sections 41-2-8 through 41-2-17.

(b) All the provisions of this Code section and Code Sections 41-2-8 through 41-2-17 including method and procedure may also be applied to private property where an accumulation of weeds, trash, junk, filth, and other unsanitary or unsafe conditions shall create a public health hazard or a general nuisance to those persons residing in the vicinity. A finding by any governmental health department, health officer, or building inspector that such property is a health or safety hazard shall constitute prima-facie evidence that said property is in violation of this Code section and Code Sections 41-2-8 through 41-2-17.

(c) The exercise of the powers conferred upon counties in this Code section and in Code Sections 41-2-8 through 41-2-17 shall be limited to properties located in the unincorporated areas of such counties. (Ga. L. 1966, p. 3089, § 2; Ga. L. 1977, p. 4445, § 2; Code 1981, § 41-2-7, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1983, p. 3, § 30; Ga. L. 1986, p. 10, § 41; Ga. L. 1986, p. 1508, § 1; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 1161, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1987, in the first sentence of subsection (b), "property" was substituted for "proeprty" and a comma was deleted following "conditions."

**Law reviews.** — For annual survey of local government law, see 38 Mercer L. Rev. 289 (1986).

For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 284 (1989).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 39 Am. Jur. 2d, Health, §§ 24, 33, 41-43. 58 Am. Jur. 2d, Nuisances, §§ 162, 163, 321.

**C.J.S.** — 39A C.J.S., Health and Environment, §§ 30-32, 48, 49. 66 C.J.S., Nuisances, §§ 36, 40, 41, 109 et seq.

**41-2-8. Definitions for use in Code Sections 41-2-7 through 41-2-17.**

As used in Code Section 41-2-7, this Code section, and Code Sections 41-2-9 through 41-2-17, the term:

(1) "Closing" means securing and causing a dwelling, building, or structure to be vacated.

(2) "Drug crime" means an act which is a violation of Article 2 of Chapter 13 of Title 16, known as the "Georgia Controlled Substances Act."

(3) "Dwellings, buildings, or structures" means any building or structure or part thereof used and occupied for human habitation or commercial, industrial, or business uses, or intended to be so used, and includes any outhouses and appurtenances belonging thereto or usually enjoyed therewith and also includes any building or structure of any design. As used in Code Section 41-2-7, this Code section, and Code Sections 41-2-9 through 41-2-17, the term "dwellings, buildings, or structures" shall not mean or include any farm, any building or structure located on a farm, or any agricultural facility or other building or structure used for the production, growing, raising, harvesting, storage, or processing of crops, livestock, poultry, or other farm products.

(4) "Governing body" means the board of commissioners or sole commissioner of a county or the council, board of commissioners, board of aldermen, or other legislative body charged with governing a municipality.

(5) "Municipality" means any incorporated city within this state.

(6) "Owner" means the holder of the title in fee simple and every mortgagee of record.

(7) "Parties in interest" means persons in possession of said property and all individuals, associations, and corporations who have interest of record in the county where the property is located in a dwelling, building, or structure, including executors, administrators, guardians, and trustees.

(8) "Public authority" means any housing authority or any officer who is in charge of any department or branch of the government of the municipality, county, or state relating to health, fire, or building regulations or to other activities concerning dwellings, buildings, or structures in the county or municipality.

(9) "Public officer" means the officer or officers who are authorized by Code Section 41-2-7, this Code section, and Code Sections 41-2-9 through 41-2-17 and by ordinances adopted under Code Section 41-2-7, this Code section, and Code Sections 41-2-9 through 41-2-17 to exercise the powers prescribed by such ordinances or any agent of such officer or officers.

(10) "Repair" means closing a dwelling, building, or structure or the cleaning or removal of debris, trash, and other materials present and accumulated which create a health or safety hazard in or about any dwelling, building, or structure. (Code 1981, § 41-2-8, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1986, p. 1508, § 2; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 14, § 41; Ga. L. 1989, p. 1161, § 2; Ga. L. 1991, p. 94, § 41.)

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 284 (1989).

#### **41-2-9. County or municipal ordinances relating to unfit buildings or structures.**

(a) As used in this Code section, the term "resident" means any person residing in the affected jurisdiction on or before the date on which the alleged nuisance arose.

(b) Upon the adoption of an ordinance finding that dwelling, building, or structure conditions of the character described in Code Section 41-2-7 exist within a county or municipality, the governing body of such county or municipality is authorized to adopt ordinances relating to the dwellings, buildings, or structures within such county or municipality which are unfit for human habitation or commercial, industrial, or business uses. Such ordinances shall include the following provisions:

(1) That a public officer be designated or appointed to exercise the powers prescribed by the ordinances;

(2) That whenever a request is filed with the public officer by a public authority or by at least five residents of the municipality or by five residents of the unincorporated area of the county if the property in question is located in the unincorporated area of the county charging that any dwelling, building, or structure is unfit for human habitation or for commercial, industrial, or business use or whenever it appears to the public officer (on his own motion) that any dwelling, building, or structure is unfit for human habitation or is unfit for its current commercial, industrial, or business use or is vacant, dilapidated, and being used in connection with the commission of drug crimes, the public officer shall, if his preliminary investigation discloses a basis for such charges, issue and cause to be served upon the owner of and any parties

in interest in such dwelling, building, or structure a complaint stating the charges in that respect and containing a notice that a hearing will be held before the public officer (or his designated agent) at a place within the county or municipality in which the property is located, fixed not less than ten days nor more than 30 days after the serving of said complaint; that the owner and any parties in interest shall be given the right to file an answer to the complaint and to appear in person, or otherwise, and give testimony at the place and time fixed in the complaint; and that the rules of evidence prevailing in courts of law or equity shall not be controlling in hearings before the public officer;

(3) That if, after such notice and hearing, the public officer determines that the dwelling, building, or structure under consideration is unfit for human habitation or is unfit for its current commercial, industrial, or business use or is vacant, dilapidated, and being used in connection with the commission of drug crimes, he shall state in writing his findings of fact in support of such determination and shall issue and cause to be served upon the owner thereof an order:

(A) If the repair, alteration, or improvement of the said dwelling, building, or structure can be made at a reasonable cost in relation to the value of the dwelling, building, or structure, requiring the owner or parties in interest, within the time specified in the order, to repair, alter, or improve such dwelling, building, or structure so as to render it fit for human habitation or for current commercial, industrial, or business use or to vacate and close the dwelling, building, or structure as a human habitation; or

(B) If the repair, alteration, or improvement of the said dwelling, building, or structure cannot be made at a reasonable cost in relation to the value of the dwelling, building, or structure, requiring the owner or parties in interest, within the time specified in the order, to remove or demolish such dwelling, building, or structure.

In no event shall the governing authority of any such county or municipality require removal or demolition of any dwelling, building, or structure except upon a finding that the cost of repair, alteration, or improvement thereof exceeds one-half the value such dwelling, building, or structure will have when repaired to satisfy the minimum requirements of this law;

(4) That, if the owner or parties in interest fail to comply with an order to vacate and close or demolish the dwelling, building, or structure, the public officer may cause such dwelling, building, or structure to be repaired, altered, or improved or to be vacated and closed or demolished; and that the public officer may cause to be posted on the main entrance of any building, dwelling, or structure so closed a placard with the following words:



“This building is unfit for human habitation or commercial, industrial, or business use; the use or occupation of this building for human habitation or for commercial, industrial, or business use is prohibited and unlawful.”;

(5) That, if the owner fails to comply with any order to remove or demolish the dwelling, building, or structure, the public officer may cause such dwelling, building, or structure to be removed or demolished; provided, however, that the duties of the public officer, set forth in paragraph (4) of this Code section and this paragraph, shall not be exercised until the governing body shall have by ordinance ordered the public officer to proceed to effectuate the purpose of Code Sections 41-2-7, 41-2-8, this Code section, and Code Sections 41-2-10 through 41-2-17 with respect to the particular property or properties which the public officer shall have found to be unfit for human habitation or unfit for its current commercial, industrial, or business use, which property or properties shall be described in the ordinance;

(6) That the amount of the cost of such vacating and closing or removal or demolition by the public officer shall be a lien against the real property upon which such cost was incurred. Said lien shall attach to the real property upon the payment of all costs of demolition by the county or municipality and the filing of an itemized statement of the total sum of said costs by the public officer in the office of the clerk of the governing body of the county or municipality on a lien docket maintained by said clerk for such purposes. If the dwelling, building, or structure is removed or demolished by the public officer he shall sell the materials of such dwellings, buildings, or structures and shall credit the proceeds of such sale against the cost of the removal or demolition and any balance remaining shall be deposited in the superior court by the public officer, shall be secured in such manner as may be directed by such court, and shall be disbursed by such court to the persons found to be entitled thereto by final order or decree of such court. Nothing in this Code section shall be construed to impair or limit in any way the power of the county or municipality to define and declare nuisances and to cause their removal or abatement by summary proceedings or otherwise;

(7) Counties and municipal corporations may enforce the collection of any amount due on such lien for removal or demolition of dwellings, buildings, or structures only in the following manner:

(A) The owner or parties at interest shall be allowed to satisfy the amount due on such lien by paying to the county or municipal corporation, within 30 days after the perfection of said lien, a sum of money equal to 25 percent of the total amount due and by further paying to said county or municipal corporation the remaining balance due on such lien, together with interest at the rate of 7 percent per annum, in three equal annual payments, each of which shall become

due and payable on the anniversary date of the initial payment made as hereinabove prescribed;

(B) Should the property upon which such lien is perfected be sold, transferred, or conveyed by the owner or parties at interest at any time prior to the termination of the said three-year period, then the entire balance due on such lien shall be due and payable to the county or municipal corporation; and

(C) Should the amount due on such lien, or any portion thereof, be unpaid after the passage of said three-year period, or upon the occurrence of the contingency provided for in subparagraph (B) of this paragraph, the county or municipal corporation may enforce the collection of any amount due on such lien for alteration, repair, removal, or demolition of dwellings, buildings, or structures in the same manner as provided in Code Section 48-5-358 and other applicable state statutes. This procedure shall be subject to the right of redemption by any person having any right, title, or interest in or lien upon said property, all as provided by Article 3 of Chapter 4 of Title 48. (Code 1981, § 41-2-9, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1983, p. 3, § 30; Ga. L. 1984, p. 22, § 41; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 14, § 41; Ga. L. 1989, p. 1161, § 3; Ga. L. 1990, p. 1347, § 1; Ga. L. 1991, p. 94, § 41.)

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 284 (1989).

**41-2-10. Determination by public officer that dwelling, building, or structure is unfit or vacant, dilapidated, and being used in connection with the commission of drug crimes.**

(a) An ordinance adopted by a county or municipality under Code Sections 41-2-7 through 41-2-9, this Code section, and Code Sections 41-2-11 through 41-2-17 shall provide that the public officer may determine, under existing ordinances, that a dwelling, building, or structure is unfit for human habitation or is unfit for its current commercial, industrial, or business use if he finds that conditions exist in such building, dwelling, or structure which are dangerous or injurious to the health, safety, or morals of the occupants of such dwelling, building, or structure; of the occupants of neighborhood dwellings, buildings, or structures; or of other residents of such county or municipality. Such conditions may include the following (without limiting the generality of the foregoing):

- (1) Defects therein increasing the hazards of fire, accidents, or other calamities;
- (2) Lack of adequate ventilation, light, or sanitary facilities;
- (3) Dilapidation;

- (4) Disrepair;
- (5) Structural defects; and
- (6) Uncleanliness.

Such ordinance may provide additional standards to guide the public officer, or his agents, in determining the fitness of a dwelling, building, or structure for human habitation or for its current commercial, industrial, or business use.

(b) An ordinance adopted by a county or municipality under Code Sections 41-2-7 through 41-2-9, this Code section, and Code Sections 41-2-11 through 41-2-17 shall provide that the public officer may determine, under existing ordinances, that a dwelling, building, or structure is vacant, dilapidated, and being used in connection with the commission of drug crimes upon personal observation or report of a law enforcement agency and evidence of drug crimes being committed. (Code 1981, § 41-2-10, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 1161, § 4; Ga. L. 1991, p. 94, § 41.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1988, "municipality. Such" was substituted for "municipality; such" in the introductory paragraph of the Code section.

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 284 (1989).

#### **41-2-11. Powers of public officers in regard to unfit buildings or structures.**

An ordinance adopted by the governing body of the county or municipality may authorize the public officer to exercise such powers as may be necessary or convenient to carry out and effectuate the purpose and provisions of Code Sections 41-2-7 through 41-2-10, this Code section, and Code Sections 41-2-12 through 41-2-17, including the following powers in addition to others granted in Code Sections 41-2-7 through 41-2-10 and Code Sections 41-2-12 through 41-2-17:

(1) To investigate the dwelling conditions in the unincorporated area of the county or in the municipality in order to determine which dwellings, buildings, or structures therein are unfit for human habitation or are unfit for current commercial, industrial, or business use or are vacant, dilapidated, and being used in connection with the commission of drug crimes;

(2) To administer oaths and affirmations, to examine witnesses, and to receive evidence;

(3) To enter upon premises for the purpose of making examinations; provided, however, that such entries shall be made in such manner as to cause the least possible inconvenience to the persons in possession;



(4) To appoint and fix the duties of such officers, agents, and employees as he deems necessary to carry out the purposes of the ordinances; and

(5) To delegate any of his functions and powers under the ordinance to such officers and agents as he may designate. (Code 1981, § 41-2-11, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 1161, § 5; Ga. L. 1991, p. 94, § 41.)

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 284 (1989).

**41-2-12. Service of complaints or orders upon parties in interest and owners of unfit buildings or structures.**

(a) Complaints or orders issued by a public officer pursuant to an ordinance adopted under Code Sections 41-2-7 through 41-2-11, this Code section, and Code Sections 41-2-13 through 41-2-17 shall, in all cases, be served upon each person in possession of said property, each owner, and each party in interest; and the return of service signed by the public officer or his agent or an affidavit of service executed by any citizen of this state, reciting that a copy of such complaint or orders was served upon each person in possession of said property, each owner, and each party in interest personally or by leaving such copy at the place of his residence, shall be sufficient evidence as to the service of such person in possession, owner, and party in interest.

(b) If any of the owners and parties in interest shall reside out of the county or municipality, service shall be perfected by causing a copy of such complaint or orders to be served upon such party or parties by the sheriff or any lawful deputy of the county of the residence of such party or parties or such service may be made by any citizen; and the return of such sheriff or lawful deputy or the affidavit of such citizen that such party or parties were served either personally or by leaving a copy of the complaint or orders at the residence shall be conclusive as to such service.

(c) Nonresidents of this state shall be served by posting a copy of such complaint or orders in a conspicuous place on premises affected by the complaint or orders. Where the address of such nonresidents is known, a copy of such complaint or orders shall be mailed to them by registered or certified mail.

(d) In the event either the owner or any party in interest is a minor or an insane person or person laboring under disabilities, the guardian or other personal representative of such person shall be served and if such guardian or personal representative resides outside the county or municipality or is a nonresident, he shall be served as provided for in subsection (c) of this Code section or this subsection in such cases. If such minor or insane

person or person laboring under disabilities has no guardian or personal representative or in the event such minor or insane person lives outside the county or municipality or is a nonresident, service shall be perfected by serving such minor or insane person personally or by leaving a copy at the place of his residence which shall be sufficient evidence as to the service of such person or persons; in the case of other persons who live outside of the county or municipality or are nonresidents, service shall be perfected by serving the judge of the probate court of the county wherein such property is located who shall stand in the place of and protect the rights of such minor or insane person or appoint a guardian ad litem for such person.

(e) In the event the whereabouts of any owner or party in interest is unknown and the same cannot be ascertained by the public officer in the exercise of reasonable diligence and the public officer shall make an affidavit to that effect, then the service of such complaint or order upon such persons shall be made in the same manner as provided in subsection (c) of this Code section or service may be perfected upon any person, firm, or corporation holding itself out as an agent for the property involved.

(f) A copy of such complaint or orders shall also be filed in the proper office or offices for the filing of lis pendens notice in the county in which the dwelling, building, or structure is located and such filing of the complaint or orders shall have the same force and effect as other lis pendens notices provided by law. Any such complaint or orders or an appropriate lis pendens notice may contain a statement to the effect that a lien may arise against the described property and that an itemized statement of such lien is maintained on a lien docket maintained by the clerk of the governing body of the county or municipality. (Code 1981, § 41-2-12, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1983, p. 3, § 30; Ga. L. 1986, p. 1508, § 3; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 14, § 41; Ga. L. 1991, p. 94, § 41; Ga. L. 1992, p. 1538, § 1.)

**Code Commission notes.** — Pursuant to “Code Sections 41-2-13 through 41-2-17” in Code Section 28-9-5, in 1991, “Code Section 41-2-13 through 41-2-17” was changed to subsection (a).

#### **41-2-13. Injunctions against order to repair, close, or demolish unfit buildings or structures.**

Any person affected by an order issued by the public officer may petition to the superior court for an injunction restraining the public officer from carrying out the provisions of the order and the court may, upon such petition, issue a temporary injunction restraining the public officer pending the final disposition of the cause; provided, however, that such person shall present such petition to the court within 15 days of the posting and service of the order of the public officer. De novo hearings shall be had by the court on petitions within 20 days. The court shall hear and determine the issues raised and shall enter such final order or decree as law and justice

may require; provided, however, that it shall not be necessary to file bond in any amount before obtaining a temporary injunction under this Code section. (Code 1981, § 41-2-13, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1983, p. 3, § 30.)

**41-2-14. Taking of unfit buildings or structures by eminent domain; police power.**

Nothing in Code Sections 41-2-7 through 41-2-13, this Code section, and Code Sections 41-2-15 through 41-2-17 shall be construed as preventing the owner or owners of any property from receiving just compensation for the taking of such property by the power of eminent domain under the laws of this state nor as permitting any property to be condemned or destroyed except in accordance with the police power of this state. (Code 1981, § 41-2-14, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1991, p. 94, § 41.)

**41-2-15. Authority to use revenues, grants, and donations to repair, close, or demolish unfit buildings or structures.**

Any county or municipality is authorized to make such appropriations from its revenues as it may deem necessary and may accept and apply grants or donations to assist it in carrying out the provisions of ordinances adopted in connection with the exercise of the powers granted under this chapter. (Code 1981, § 41-2-15, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 14, § 41.)

**41-2-16. Construction of Code Sections 41-2-7 through 41-2-17 with county or municipal local enabling Act, charter, and other laws, ordinances, and regulations.**

Nothing in Code Sections 41-2-7 through 41-2-15, this Code section, and Code Section 41-2-17 shall be construed to abrogate or impair the powers of the courts or of any department of any county or municipality to enforce any provisions of its local enabling Act, its charter, or its ordinances or regulations nor to prevent or punish violations thereof; and the powers conferred by this article shall be in addition to and supplemental to the powers conferred by any other law. (Code 1981, § 41-2-16, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1988, p. 1419, § 2; Ga. L. 1991, p. 94, § 41.)

**41-2-17. Prior ordinances relating to repair, closing, or demolition of unfit buildings or structures.**

Ordinances relating to the subject matter of Code Sections 41-2-7 through 41-2-16 and this Code section adopted prior to April 1, 1966, shall have the same force and effect on and after said date as ordinances adopted subsequent to and by authority of these Code sections. (Code 1981, § 41-2-17, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1991, p. 94, § 41.)



CHAPTER 3

PLACES USED FOR UNLAWFUL SEXUAL PURPOSES

Sec.		Sec.	
41-3-1.	Establishment, maintenance, or use of building, structure, or place for unlawful sexual purposes; evidence of nuisance.	41-3-7.	Order of abatement generally; breaking and entering or using closed building, structure, or place; fees for removal, sale, or closure of property.
41-3-1.1.	Substantial drug related activity upon real property; knowledge of owner.	41-3-8.	Disposition of proceeds of sale of personal property.
41-3-2.	Action to enjoin nuisance perpetually; temporary restraining order or interlocutory injunction authorized.	41-3-9.	Suspension of abatement order and release of property; effect of release of property.
41-3-3.	Dismissal of complaint filed by private citizen; substitution of district attorney or another private citizen for original complainant.	41-3-10.	Issuance of permanent injunction; entry and enforcement of judgment; disposition of sums arising from enforcement of judgment.
41-3-4.	Notice of hearing upon application for temporary restraining order or interlocutory injunction.	41-3-11.	Injunction binding throughout judicial circuit in which issued; violation of provisions of injunction deemed contempt.
41-3-5.	Procedure for trial of action generally; admissibility of evidence of general reputation of building, structure, or place.	41-3-12.	Contempt proceedings; punishment for contempt of court.
41-3-6.	Taxation of cost of action against private citizen bringing action without reasonable ground or cause.	41-3-13.	Abatement of nuisance by state courts and municipal courts of municipalities having population of 15,000 or more.

**Cross references.** — Penalties for sodomy, prostitution, keeping place of prostitution, etc., Ch. 6, T. 16. Use of rooms in road-houses, public dance halls, etc., for immoral purposes, § 43-21-61.

JUDICIAL DECISIONS

**Nude dancing.** — The nuisance statute had no application in the context of an action attempting to enjoin nude dancing at defendant's establishment. *Fenimore v. State*, 263 Ga. 760, 438 S.E.2d 911 (1993). Cited in *Davis v. Stark*, 198 Ga. 223, 31 S.E.2d 592 (1944); *Imperial Massage & Health Studio, Inc. v. Lee*, 231 Ga. 482, 202 S.E.2d 426 (1973).

**41-3-1. Establishment, maintenance, or use of building, structure, or place for unlawful sexual purposes; evidence of nuisance.**

(a) Whosoever shall knowingly erect, establish, continue, maintain, use, own, or lease any building, structure, or place used for the purpose of

lewdness, prostitution, sodomy, the solicitation of sodomy, or masturbation for hire shall be guilty of maintaining a nuisance; and the building, structure, or place, and the ground itself in or upon which such lewdness, prostitution, sodomy, the solicitation of sodomy, or masturbation for hire shall be conducted, permitted, carried on, continued, or shall exist, and the furniture, fixtures, and other contents of such building or structure are also declared to be a nuisance and may be enjoined or otherwise abated as provided in this chapter.

(b) The conviction of the owner or operator of any building, structure, or place for any of the offenses stated in subsection (a) of this Code section, based on conduct or an act or occurrence in or on the premises of such building, structure, or place, shall be prima-facie evidence of the nuisance and the existence thereof. (Ga. L. 1917, p. 177, § 1; Code 1933, § 72-301; Ga. L. 1975, p. 402, § 2; Ga. L. 1979, p. 1025, § 1.)

**Cross references.** — Provisions regarding violation of laws relating to obscenity, public nuisance status of premises used in § 16-12-82.

### JUDICIAL DECISIONS

**Use of evidentiary standard does not convert action to equitable proceeding.** — Where a party elects to proceed under § 41-2-5, it is an action at law and using the evidentiary standard contained in this section does not convert the proceeding into an equitable one. *Yield, Inc. v. City of Atlanta*, 145 Ga. App. 172, 244 S.E.2d 32, cert. dismissed, 241 Ga. 593, 247 S.E.2d 764 (1978).

**Allegations establishing cause of action.** — A petition by the solicitor general (now district attorney) to abate described premises as a public nuisance, alleging that the premises are being maintained and used for the purpose of prostitution and assignation, in violation of this section, et seq., and attaching as a part of the petition affidavits by three persons who testify that the premises have been used as alleged, states a cause of action; a judgment overruling a general demurrer (now motion to dismiss) to the petition is not erroneous. *Carpenter v. State ex rel. Hains*, 194 Ga. 395, 21 S.E.2d 643 (1942).

The petition, alleging in substance that the defendant was operating a lewd house; was operating and maintaining a gaming house; was illegally selling beer, whiskey and other alcoholic beverages to minors; was maintaining on his premises a juke box whose loud playing was disturbing the neighborhood and people passing by on the high-

way; and was providing a gathering place for minors and the general public to drink, dance and carouse, was sufficient to state a cause of action for abatement of a public nuisance by the solicitor general (now district attorney). *Lee v. Hayes*, 215 Ga. 330, 110 S.E.2d 624 (1959).

**Modification of judgment so as to release building and contents.** — In a proceeding under this chapter, to abate as a nuisance a described tourist camp owned by the defendant, on the ground that "said place and its contents" were being knowingly maintained and used by the defendant for the purpose of lewdness, assignation and prostitution, where the judge, by consent trying the case, without a jury, found and decreed that all of the buildings in the tourist camp, with the personalty in each, were used by the defendant "as one plant or combine" for the purpose of lewdness and prostitution, the defendant, after an affirmance of such judgment by the Supreme Court, could not obtain a modification of it so as to release one of the buildings and its contents, by showing that this part of the tourist camp was in no way connected with the alleged nuisance; the original finding and decree as to this matter being conclusive. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

**Cited in** *Crews v. State ex rel. Hayes*, 215 Ga. 698, 113 S.E.2d 116 (1960); *Whitehead v.*

Hasty, 235 Ga. App. 331, 219 S.E.2d 443 (1975); Yield, Inc. v. City of Atlanta, 239 Ga. 578, 238 S.E.2d 351 (1977); 660 Lindbergh,

Inc. v. City of Atlanta, 492 F. Supp. 511 (N.D. Ga. 1980); Gateway Books, Inc. v. State, 247 Ga. 16, 276 S.E.2d 1 (1981).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 24 Am. Jur. 2d, Disorderly Houses, § 41. 58 Am. Jur. 2d, Nuisances, §§ 50-65, 348.

**C.J.S.** — 66 C.J.S., Nuisances, §§ 45, 109.

**ALR.** — Disorderly character of house as affected by the number of females who reside therein or resort thereto for immoral purposes, 12 ALR 529.

Validity and construction of statute or ordinances forbidding treatment in health clubs or massage salons by persons of the opposite sex, 51 ALR3d 936.

Massage parlor as nuisance, 80 ALR3d 1020.

#### 41-3-1.1. Substantial drug related activity upon real property; knowledge of owner.

(a) As used in this Code section, the term:

(1) "Drug related indictment" means an indictment by a grand jury for an offense involving violation of Code Section 16-13-30; provided, however, that any such indictments which result directly from cooperation between the property owner and a law enforcement agency shall not be considered a drug related indictment for purposes of this Code section.

(2) "Substantial drug related activity" means activity resulting in six or more separate incidents resulting in drug related indictments involving violations occurring within a 12 month period on the same parcel of real property.

(b) Any owner of real property who has actual knowledge that substantial drug related activity is being conducted on such property shall be guilty of maintaining a nuisance, and such real property shall be deemed a nuisance and may be enjoined or otherwise abated as provided in this chapter.

(c) The owner of real property shall be deemed to have actual knowledge of substantial drug related activity occurring on a parcel of real property if the district attorney of the county in which the property is located notifies the owner in writing of three or more separate incidents within a 12 month period which result in drug related indictments and, after the receipt of such notice and within 12 months of the first of the incidents resulting in a drug related indictment which are the subject of such notice, three or more separate incidents occur which result in drug related indictments. (Code 1981, § 41-3-1.1, enacted by Ga. L. 1996, p. 666, § 1.)

**Effective date.** — This Code section became effective July 1, 1996.



### **41-3-2. Action to enjoin nuisance perpetually; temporary restraining order or interlocutory injunction authorized.**

Whenever a nuisance is kept, maintained, or exists, as defined in Code Section 41-3-1 or 41-3-1.1, the district attorney or any private citizen of the county may maintain an action in the name of the state upon the relation of such district attorney or private citizen to enjoin said nuisance perpetually, the person or persons conducting or maintaining the same, and the owner or agent of the building, structure, or place, and the ground itself in or upon which such nuisance exists. In an action to enjoin a nuisance, the court, upon application therefor alleging that the nuisance complained of exists, shall order a temporary restraining order or an interlocutory injunction as provided in Code Section 9-11-65. (Ga. L. 1917, p. 177, § 2; Code 1933, § 72-302; Ga. L. 1996, p. 666, § 2.)

The 1996 amendment, effective July 1, 1996, inserted "or 41-3-1.1" near the beginning of the first sentence.

### **JUDICIAL DECISIONS**

**Cited** in *Carpenter v. State ex rel. Hains*, 194 Ga. 395, 21 S.E.2d 643 (1942); *Gateway Books, Inc. v. State*, 247 Ga. 16, 276 S.E.2d 1 (1981).

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 24 Am. Jur. 2d, Disorderly Houses, § 42. 42 Am. Jur. 2d, Injunctions, §§ 15, 265, 285-287. 58 Am. Jur. 2d, Nuisances, §§ 259, 260, 267.

**C.J.S.** — 43 C.J.S., Injunctions, §§ 17, 20-28. 66 C.J.S., Nuisances, §§ 77, 78, 125.

**ALR.** — Right to enjoin threatened or anticipated nuisance, 7 ALR 749; 26 ALR 937; 32 ALR 724; 55 ALR 880.

Venue of suit to enjoin nuisance, 7 ALR2d 481.

### **41-3-3. Dismissal of complaint filed by private citizen; substitution of district attorney or another private citizen for original complainant.**

If the complaint is filed by a private citizen, it shall not be dismissed except upon filing of a sworn statement by the complainant and his attorney setting forth the reasons why the action should be dismissed and upon approval of the dismissal by the district attorney in writing or in open court. If the court shall be of the opinion that the action ought not to be dismissed, it may direct the district attorney to maintain the action and, if the action is continued more than one term of court, any private citizen of the county or the district attorney may be substituted for the original complainant and directed to maintain the action. (Ga. L. 1917, p. 177, § 3; Code 1933, § 72-306.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 24 Am. Jur. 2d, Dismissal, Discontinuance and Nonsuit, § 11. 42 Am. Jur. 2d, Injunctions, § 235. **C.J.S.** — 27 C.J.S., Dismissal and Nonsuit, § 8. 43A C.J.S., Injunctions, § 218.

#### 41-3-4. Notice of hearing upon application for temporary restraining order or interlocutory injunction.

Notice shall be given to the defendant of the hearing of the application for a temporary restraining order or an interlocutory injunction as provided in Code Section 9-11-65. (Ga. L. 1917, p. 177, § 2; Code 1933, § 72-303.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 42 Am. Jur. 2d, Injunctions, §§ 263, 267. 58 Am. Jur. 2d, Nuisances, § 124, 237. **C.J.S.** — 66 C.J.S., Nuisances, §§ 86, 88, 125.

#### 41-3-5. Procedure for trial of action generally; admissibility of evidence of general reputation of building, structure, or place.

An action to enjoin a nuisance shall be triable as all other civil cases. In such action, evidence of the general reputation of the building, structure, or place shall be admissible for the purpose of proving the existence of such nuisance. (Ga. L. 1917, p. 177, § 3; Code 1933, § 72-305.)

## JUDICIAL DECISIONS

**Amendment showing abatement pending suit.** — It was error to refuse to allow a verified amendment to the defendant's answer to a petition to enjoin him from conducting a nuisance in violation of this statute; the allegations of the amendment showing that the nuisance had been abso-

lutely discontinued a few days after the beginning of the proceeding for injunction, and several weeks before the trial, and that all issues in the proceeding had become moot. *Yancy v. State ex rel. Kelly*, 161 Ga. 138, 129 S.E. 642 (1925).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, § 174.

**C.J.S.** — 27 C.J.S., Disorderly Houses, § 14. 66 C.J.S., Nuisances, § 127.

**ALR.** — Venue of suit to enjoin nuisance, 7 ALR2d 481.

**41-3-6. Taxation of cost of action against private citizen bringing action without reasonable ground or cause.**

If the action shall be brought by a private citizen and the court shall find that there was no reasonable ground or cause for the action, the cost may be taxed to such citizen. (Ga. L. 1917, p. 177, § 3; Code 1933, § 72-307.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 42 Am. Jur. 2d, Injunctions, §§ 308, 309.

**C.J.S.** — 43A C.J.S., Injunctions, § 252. 66 C.J.S., Nuisances, § 137.

**41-3-7. Order of abatement generally; breaking and entering or using closed building, structure, or place; fees for removal, sale, or closure of property.**

(a) If the existence of a nuisance shall be established in an action as provided in this chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building, structure, or place of all fixtures, furniture, and chattels used in conducting the nuisance and shall direct the sale thereof in the manner provided for the sale of chattels under execution; provided, however, that if it shall appear to the judge that the furniture and chattels are owned by others than the occupants of the building, structure, or place, he may order the effectual closing of the building, structure, or place against its use for any purpose for a period of one year, unless sooner released.

(b) If any person shall break and enter or use a building, structure, or place directed to be closed, as provided in subsection (a) of this Code section, he shall be punished as for contempt.

(c) For removing and selling the movable property, the sheriff or other duly qualified levying officer of the court shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and, for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court. (Ga. L. 1917, p. 177, § 5; Code 1933, § 72-309.)

**JUDICIAL DECISIONS**

**The owner of the personalty** is not an owner such as is intended by the phrase "owned by others than the occupants" and as against him the personal property shall be removed from the building or place where the nuisance was maintained, and shall be sold. In this respect the statute is mandatory, and the defendant must abide the sale and cannot prevent it by paying the costs directly.

This, however, is only one of the penalties contemplated; for the "building or place" may itself be closed and kept "closed for a period of one year, unless sooner released." *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

The reference in this section, to ownership of personalty by others than the "occupants," and the word "owner," as it appears



in § 41-3-9, providing for bond, does not contemplate a situation in which the owner is himself the party who maintained the nuisance. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

The first part of this section, as to what the judgment shall contain, simply declares in express terms that it shall include direction for removal and sale of the personalty, while the meaning of the proviso is, that although the personal property may be owned by others than the occupants, so that it cannot be sold under the abatement judgment, the court may still order the effective closing of

the building or place. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

**Evidence materially affecting public interest.** — If the judge has discretion to allow the building or buildings reopened within less than one year on petition of the defendant, it is not an arbitrary discretion; and before he could properly exercise any discretion in such matter, some new fact or condition materially affecting the public interest should be introduced. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

Cited in *Fuller v. Fuller*, 197 Ga. 719, 30 S.E.2d 600 (1944).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 24 Am. Jur. 2d, Disorderly Houses, § 48. 42 Am. Jur. 2d, Injunctions, §§ 336-340. 58 Am. Jur. 2d, Nuisances, §§ 367, 374, 376, 422, 428.

**C.J.S.** — 43A C.J.S., Injunctions, § 285 et seq. 66 C.J.S., Nuisances, §§ 108, 129, 138.

#### 41-3-8. Disposition of proceeds of sale of personal property.

The proceeds of the sale of the personal property, as provided in Code Section 41-3-7, shall be applied in payment of the cost of the action and abatement, and the balance, if any, shall be paid to the defendant. (Ga. L. 1917, p. 177, § 6; Code 1933, § 72-310.)

#### RESEARCH REFERENCES

**C.J.S.** — 66 C.J.S., Nuisances, § 207.

#### 41-3-9. Suspension of abatement order and release of property; effect of release of property.

(a) If the owner of the building, structure, or place ordered abated shall appear and pay all costs of the proceedings and file a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, conditioned that he will immediately abate the nuisance and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of the good faith of the owner, order the building, structure, or place closed under the order of abatement to be delivered to said owner and the order of abatement suspended so far as it may relate to said property.

(b) The release of the property under subsection (a) of this Code section shall not release it from any judgment lien, penalty, or liability to which it may be subject by law. (Ga. L. 1917, p. 177, § 7; Code 1933, § 72-311.)

## JUDICIAL DECISIONS

**"Owner."** — The reference in § 41-3-7, to ownership of personalty by others than the "occupants," and the word "owner," as it appears in this section, providing for bond, does not contemplate a situation in which the owner is himself the party who maintained the nuisance. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

This section does not apply to an owner who himself used the property for the purposes condemned by the statute, and against whom as the actual offender the abatement judgment was rendered. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

**Partial compliance with judgment.** — Where in a final decree it was ordered that

given buildings be closed pending further order of the court, that the personal property therein be removed and sold, and that judgment be rendered against the defendant and in favor of the state for \$300.00, with special lien on the premises as provided by law, the defendant, in paying the \$300.00 and the cost of the proceeding, would comply with the judgment only in part, and would not thereby acquire any right to a release of the realty or personalty from the order of abatement. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

## RESEARCH REFERENCES

C.J.S. — 43A C.J.S., Injunctions, § 258.

**41-3-10. Issuance of permanent injunction; entry and enforcement of judgment; disposition of sums arising from enforcement of judgment.**

(a) Whenever a permanent injunction is issued against any person for maintaining a nuisance as described in Code Section 41-3-1 or against any owner of the building, structure, or place knowingly kept or used for the purposes prohibited by this chapter, the judge granting the injunction shall, at the same time, enter judgment against the person, firm, or corporation owning said building, structure, or place in the sum of \$300.00; and said judgment shall be a special lien upon the premises complained of and the furniture and fixtures therein and shall as against the property rank from date with all other judgments or liens as provided by law.

(b) The judgment provided for in subsection (a) of this Code section shall issue in the name of the state and be enforced as other judgments in this state. The lien of the judgment upon the property used for the purpose of maintaining the nuisance shall not relieve the person maintaining the nuisance or the owner of the building, structure, or place from any of the other penalties provided by law.

(c) All sums arising from the enforcement of the judgment provided for in subsection (a) of this Code section shall be paid into the treasury of the county in which said judgment is entered and become part of the general funds of said county. (Ga. L. 1917, p. 177, § 8; Code 1933, § 72-312.)

## JUDICIAL DECISIONS

**Knowledge by owner as to use of building.**

— Knowledge on the part of the owner that the premises were being used, or that the lessee when leasing the premises intended to use the same, for the illegal purposes set forth in the act, is essential in order to subject the owner to the burden of a perma-

nent injunction and the penalty of the fine prescribed. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

**The satisfaction of a money judgment only in part** would not affect the remainder or give a new right to the defendant. *Carpenter v. State*, 195 Ga. 434, 24 S.E.2d 404 (1943).

### **41-3-11. Injunction binding throughout judicial circuit in which issued; violation of provisions of injunction deemed contempt.**

When an injunction is granted, it shall be binding on the defendant throughout the judicial circuit in which it is issued; and any violation of the provisions of the injunction shall be a contempt of court. (Ga. L. 1917, p. 177, § 2; Code 1933, § 72-304.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, § 357.

**C.J.S.** — 43A C.J.S., Injunctions, § 242.

**ALR.** — Reversal, modification, dismissal, dissolution, or resettlement of injunction order or judgment as affecting prior disobe-

dience as contempt, 148 ALR 1024.

Venue of suit to enjoin nuisance, 7 ALR2d 481.

Use of affidavits to establish contempt, 79 ALR2d 657.

### **41-3-12. Contempt proceedings; punishment for contempt of court.**

(a) In the event of the violation of any injunction granted under this chapter, the court may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information, under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to be issued for the arrest of the offender. The trial may be had upon affidavits, or either party may demand the production and oral examination of witnesses.

(b) A party found guilty of violating the provisions of an injunction shall be punished as for contempt in the discretion of the judge. (Ga. L. 1917, p. 177, § 4; Code 1933, § 72-308.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 58 Am. Jur. 2d, Nuisances, §§ 367, 374, 376.

**C.J.S.** — 43A C.J.S., Injunctions, § 285 et seq. 66 C.J.S., Nuisances, § 135.

**ALR.** — Reversal, modification, dismissal,

dissolution, or resettlement of injunction order or judgment as affecting prior disobedience as contempt, 148 ALR 1024.

Use of affidavits to establish contempt, 79 ALR2d 657.



**41-3-13. Abatement of nuisance by state courts and municipal courts of municipalities having population of 15,000 or more.**

In addition to the remedies provided for by Code Sections 41-3-2 through 41-3-12, state courts and the municipal courts of municipalities having a population of 15,000 or more according to the United States decennial census of 1970 or any future such census, when the nuisance exists within the corporate limits of such municipalities, shall have jurisdiction to hear and determine the question of the existence of the nuisance defined by Code Section 41-3-1 and, if found to exist, to order its abatement, which order shall be directed to and executed by the sheriff or marshal of any such court or his deputy. (Code 1933, § 72-313, enacted by Ga. L. 1979, p. 1025, § 2.)



## TITLE 42

### PENAL INSTITUTIONS

- Chap. 1. General Provisions, 42-1-1 through 42-1-12.
2. Board and Department of Corrections, 42-2-1 through 42-2-14.
3. Georgia Building Authority (Penal), 42-3-1 through 42-3-32.
4. Jails, 42-4-1 through 42-4-105.
5. Correctional Institutions of State and Counties, 42-5-1 through 42-5-101.
6. Detainers, 42-6-1 through 42-6-25.
7. Treatment of Youthful Offenders, 42-7-1 through 42-7-9.
8. Probation, 42-8-1 through 42-8-130.
9. Pardons and Paroles, 42-9-1 through 42-9-71.
10. Correctional Industries, 42-10-1 through 42-10-5.
11. Interstate Corrections Compact, 42-11-1 through 42-11-3.
12. Prison Litigation Reform, 42-12-1 through 42-12-9.
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**Cross references.** — Securing of attendance of prisoners at trials, § 24-10-60 et seq. Furnishing of passenger motor vehicle to warden of Georgia State Prison at Reidsville, § 35-1-2. Criminal Justice Coordi-

nating Council, Ch. 6A, T. 35. Power of municipal corporations to confine persons convicted of violating municipal ordinances, § 36-30-8.



## CHAPTER 1

## GENERAL PROVISIONS

Sec.		Sec.	
42-1-1.	Giving information to or receiving money from inmate in penal institution.		mission of communicable disease.
42-1-2.	Reward for information leading to capture of escaped inmate of penal institution under jurisdiction of Board of Corrections.	42-1-7.	Notification to transporting law enforcement agency of inmate's or patient's infectious or communicable disease.
42-1-3.	Defendant sentenced to death or life imprisonment not to be made trusty during time case on appeal; manner of confinement of defendant.	42-1-8.	Home arrest program.
42-1-4.	Work-release programs for county prisoners.	42-1-9.	Work-release, educational, and habilitative programs for county prisoners.
42-1-5.	Use of inmate for private gain.	42-1-10.	Preliminary urine screen drug tests.
42-1-6.	Injury or contact by inmate presenting possible threat of trans-	42-1-11.	Notification of crime victim of impending release of offender from imprisonment.
		42-1-12.	Registration of sexually violent predators.

#### 42-1-1. Giving information to or receiving money from inmate in penal institution.

(a) No employee of a penal institution may give advice to an inmate regarding the name or the employment of an attorney at law in any case where the inmate is confined in a penal institution or receive any sum of money paid as fees or otherwise to attorneys at law in a criminal case or cases against any inmate with which they may be connected in any capacity.

(b) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1921, p. 243, §§ 3, 5; Code 1933, §§ 27-504, 27-9903.)

**Cross references.** — Solicitation on behalf of attorneys generally, § 15-19-55.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 70 Am. Jur. 2d, Sheriffs, Police, and Constables, § 56.

**C.J.S.** — 7A C.J.S., Attorney and Client, § 150 et seq. 8 C.J.S., Bail, § 3.

**ALR.** — Propriety of telephone testimony or hearings in prison proceedings, 9 ALR5th 451.

#### 42-1-2. Reward for information leading to capture of escaped inmate of penal institution under jurisdiction of Board of Corrections.

(a) Any person, other than a law enforcement officer, who furnishes information leading to the capture of an escaped inmate from a penal

institution under the jurisdiction of the Board of Corrections may receive a reward of up to \$200.00 which shall be payable at the time the escaped inmate is returned to the custody of the Board of Corrections. The commissioner of corrections, at his discretion, may pay the reward to any person from funds appropriated or otherwise available to the Department of Corrections.

(b) When more than one person furnishes information which would entitle them to receive the rewards pursuant to subsection (a) of this Code section, the reward shall be paid to the first person furnishing the information; and, if more than one person furnishes the information at the same time, the reward shall be prorated among all persons furnishing such information. (Code 1933, § 27-101.3, enacted by Ga. L. 1972, p. 574, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1.)

**Cross references.** — Criminal penalties relating to escape of persons from lawful custody, §§ 16-10-52, 16-10-53. Reward for detection or apprehension of person com-

mitting felony, for information leading to identification of person who murders law enforcement officer, etc., §§ 45-12-35 through 45-12-37.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Rewards, §§ 6-12, 22, 25, 27, 29.

**ALR.** — Construction of statute authorizing public authorities to offer rewards for arrest and conviction of persons guilty of crime, 86 ALR 579.

Right to reward of furnisher of informa-

tion leading to arrest and conviction of offenders, 100 ALR2d 573.

Validity, construction, and application of statutes regulating bail bond business, 13 ALR3d 618.

Knowledge of reward as condition of right thereto, 86 ALR3d 1142.

#### **42-1-3. Defendant sentenced to death or life imprisonment not to be made trusty during time case on appeal; manner of confinement of defendant.**

Any defendant who has been convicted of a felony and sentenced to death or life imprisonment shall not be made a trusty at any penal institution or facility in this state during the time that his case is on appeal. The defendant shall be confined in the same manner as other prisoners. (Ga. L. 1981, p. 1429, § 2.)

**Cross references.** — Death penalty generally, § 17-10-30 et seq.

#### **42-1-4. Work-release programs for county prisoners.**

(a) Any person sentenced to confinement as a county prisoner under paragraph (1) of subsection (a) of Code Section 17-10-3 or otherwise sentenced to confinement as a county prisoner may, if there is reasonable cause to believe that he will honor his trust, be allowed to participate in a

work-release program as authorized by this Code section. Participation in a work-release program shall be voluntary on the part of the inmate.

(b) When an inmate receives permission to participate in a work-release program, the limits of the place of the confinement of the inmate shall be expanded by allowing the inmate under prescribed conditions to work at paid employment or participate in a training program in the community while continuing as an inmate of the institution to which he is committed. The willful failure of an inmate to remain within the extended limits of his confinement or to return within the prescribed time to the institution shall constitute an escape from the institution and shall be punished as provided in Code Section 16-10-52.

(c) If there is reasonable cause to believe that an inmate will honor his trust, the inmate may be authorized to participate in a work-release program by:

(1) The sentencing judge at the time of sentencing; or

(2) The sheriff, warden, or other official in charge of the institution to which the inmate is committed if written approval is obtained from the sentencing judge.

(d) An inmate authorized to participate in a work-release program under this Code section shall comply with all rules and regulations promulgated by the institution in which he is confined relative to the handling, disbursement, and holding in trust of all funds earned by the inmate while under the jurisdiction of the institution. An amount determined to be the cost of the inmate's keep and confinement shall be deducted from the earnings of each inmate, and such amount shall be deposited in the treasury of the county. After deduction for keep and confinement the official in charge of the institution shall:

(1) Allow the inmate to draw from the balance a reasonable sum to cover his incidental expenses;

(2) Retain to the inmate's credit an amount as deemed necessary to accumulate a reasonable sum to be paid to him on his release from the institution; and

(3) Cause to be paid any additional balance as is needed for the support of the inmate's dependents.

(e) No inmate participating in a work-release program under this Code section shall be deemed to be an agent, employee, or involuntary servant of the county while working or participating in training or going to and from his place of employment or training. (Code 1981, § 42-1-4, enacted by Ga. L. 1985, p. 1259, § 1.)



**Cross references.** — Work-release, educational, and rehabilitative programs for county prisoners, § 42-1-9.

**Editor's notes.** — Both Ga. L. 1985, p.

1259, § 1 and Ga. L. 1985, p. 1483, § 1 enacted a Code Section 42-1-4. The former has been set out as Code Section 42-1-4 and the latter as Code Section 42-1-5.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 159.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 40, 59.

### 42-1-5. Use of inmate for private gain.

(a) As used in this Code section, the term:

(1) "Custodian" means a warden, sheriff, jailer, deputy sheriff, police officer, or any other law enforcement officer having actual custody of an inmate.

(2) "Inmate" means any person who is lawfully incarcerated in a penal institution.

(3) "Penal institution" means any place of confinement for persons accused of or convicted of violating a law of this state or an ordinance of a political subdivision of this state.

(b) It shall be unlawful for a custodian of an inmate of a penal institution to use such inmate or allow such inmate to be used for any purpose resulting in private gain to any individual.

(c) Any person who violates subsection (b) of this Code section shall be guilty of a misdemeanor.

(d) This Code section shall not apply to:

(1) Work on private property because of natural disasters;

(2) Work or other programs or releases which have the prior approval of the board or commissioner of corrections;

(3) Community service work programs; or

(4) Work-release programs. (Code 1981, § 42-1-4, enacted by Ga. L. 1985, p. 1483, § 1; Ga. L. 1991, p. 94, § 42.)

**Code Commission notes.** — Both Ga. L. 1985, p. 1259 and Ga. L. 1985, p. 1483 enacted a Code Section 42-1-4. Additionally, Ga. L. 1985, p. 1483 contained "board or commissioner of offender rehabilitation" in

paragraph (2) of subsection (d). Pursuant to Code Section 28-9-5, this Code section has been renumbered Code Section 42-1-5 and "offender rehabilitation" changed to "corrections."

**JUDICIAL DECISIONS**

Cited in *Smith v. Deering*, 880 F. Supp. 816 (S.D. Ga. 1994).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 162 et seq.

**42-1-6. Injury or contact by inmate presenting possible threat of transmission of communicable disease.**

If any inmate of any state or county correctional institution, county or municipal jail, or other similar facility, while such inmate is in custody or in the process of being taken into custody, injures or has injured or contacts or has contacted a law enforcement officer, correctional officer, fireman, emergency medical technician, or other person in such a manner as to present a possible threat of transmission of a communicable disease to the person so injured or contacted, then the warden, jailer, or other official having charge of such inmate may take all reasonable steps to determine whether the inmate has a communicable disease capable of being transmitted by the injury or contact involved. Such steps may include, but shall not be limited to, any appropriate medical examination of or collection of medical specimens from the inmate. In the event an inmate refuses to cooperate in any such procedures, the warden, jailer, or other official may apply to the superior court of the county for an order authorizing the use of any degree of force reasonably necessary to complete such procedures. Upon a showing of probable cause that the injury presents the threat of transmission of a communicable disease, the court shall issue an order authorizing the petitioner to use reasonable measures to perform any medical procedures reasonably necessary to ascertain whether a communicable disease has been transmitted. In addition to any other grounds sufficient to show probable cause for the issuance of such an order, such probable cause may be conclusively established by evidence of the injury or contact in question and a statement by a licensed physician that the nature of the injury or contact is such as to present a threat of transmission of a communicable disease if the inmate has such a disease. The cost of any procedures carried out under this Code section shall be borne by the jurisdiction having custody of the inmate. (Code 1981, § 42-1-6, enacted by Ga. L. 1987, p. 1446, § 1.)

**42-1-7. Notification to transporting law enforcement agency of inmate's or patient's infectious or communicable disease.**

(a) For the purposes of this Code section, the term "infectious or communicable disease" shall include infectious hepatitis, tuberculosis,

influenza, measles, chicken pox, meningitis, HIV as defined in Code Section 31-22-9.1, or any venereal disease enumerated in Code Section 31-17-1.

(b) Notwithstanding any other provision of law, any state or county correctional institution, municipal or county detention facility, or any facility as defined in Code Section 37-3-1 shall notify any state or local law enforcement agency required to transport an inmate or patient if such inmate or patient has been diagnosed as having an infectious or communicable disease. Notification shall be limited to the fact that such inmate or patient has an infectious or communicable disease and whether such disease is airborne or transmissible by blood or other body fluids; provided, however, that the specific disease shall not be disclosed. The Department of Human Resources shall provide a guide for appropriate precautions to be taken by any person or persons transporting such inmate or patient and shall develop a form to be used for the purpose of ensuring that such precautions are taken.

(c) Information released or obtained pursuant to this Code section shall be privileged and confidential and shall only be released or obtained by the institutions, facilities, or agencies who are parties to the transportation of the patient or inmate. Any person making an unauthorized disclosure of such information shall be guilty of a misdemeanor. (Code 1981, § 42-1-7, enacted by Ga. L. 1991, p. 1319, § 1.)

**Code Commission notes.** — Ga. L. 1991, p. 1319, § 1, Ga. L. 1991, p. 1348, § 1, and Ga. L. 1991, p. 1352, § 1, all purport to enact Code Section 42-1-7. Pursuant to Code

Section 28-9-5, Ga. L. 1991, p. 1348, § 1, has been renumbered as Code Section 42-1-8 and Ga. L. 1991, p. 1352, § 1, has been renumbered as Code Section 42-1-9.

#### **42-1-8. Home arrest program.**

(a) As used in this Code section, the term:

(1) “Educational program” means a program of learning recognized by the State Board of Education.

(2) “Habilitative program” means and includes an alcohol or drug treatment program, mental health program, family counseling, community service, or any other community program ordered or approved by the court having jurisdiction over the offender or by the sheriff.

(3) “Home arrest” means an electronic monitoring of an offender at a residence approved and accepted by the court, the sheriff, or the director or administrator of the home arrest program.

(b) Notwithstanding the provisions of Code Section 42-1-4, any person who is confined in a county jail (1) after conviction and sentencing, (2) pending completion of a presentencing report, or (3) after return for a violation of the terms of probation may, in the discretion of the sheriff and



subject to the eligibility requirements set forth in subsection (d) of this Code section, be assigned to a home arrest program under supervision of the sheriff. If it appears to the court that an offender subject to its jurisdiction is a suitable candidate for a home arrest program, the court may, subject to the eligibility requirements of subsection (d) of this Code section, order the offender to a home arrest program. Further, the sheriff or the court may authorize the offender to participate in educational or other habilitative programs designed to supplement home arrest.

(c) Whenever the sheriff assigns an offender to home arrest, the court which sentenced such offender or before which such offender's case is pending shall be notified in writing by the sheriff or the director or administrator of the home arrest program to which the offender is assigned of the offender's place of employment and the location of any educational or habilitative program in which the offender participates. The court, in its discretion, may revoke the authority for any offender to participate in home arrest, whether such offender was assigned to home arrest by the court or the sheriff. The sheriff or home arrest director or administrator may enter into an agreement to accept into the local home arrest program offenders who are sentenced to home arrest or who have met all home arrest standards.

(d) In order to qualify for assignment to a home arrest program, an offender:

(1) May not be subject to any outstanding warrants or orders from any other court or law enforcement agency;

(2) Shall not have any criminal record or any history within the preceding five years of any assaultive offenses of an aggravated nature, including, but not limited to, aggravated assault; aggravated battery; rape; child molestation; robbery; trafficking or distribution of a controlled substance or marijuana; homicide by vehicle; felony bail-jumping; or escape; or

(3) May not have any life-threatening illnesses or disabilities that would interfere with the ability to work on a regular schedule.

(e) An offender's employment under this Code section shall be with a legitimate, recognized, and established employer. An offender assigned to a home arrest program who, without proper authority, leaves his home or the work area to which he is assigned, who leaves or fails to attend an assigned educational or other rehabilitative program, or who leaves the vehicle or route of travel in going to or returning from his assigned place of work shall be guilty of a misdemeanor. If the offender leaves the county or the area of restriction, he may be found guilty of escape under Code Section 16-10-52. An offender who is found guilty of a misdemeanor under this subsection or of escape shall be ineligible for further participation in a home arrest program during his current term of confinement.

(f) Any wages earned by an offender in home arrest under this Code section may, upon order of the court or the sheriff, be paid to the director or administrator of the home arrest program after standard payroll deductions required by federal or state law have been withheld. Distribution of such wages shall be made for the following purposes:

(1) To defray the cost of home arrest electronic monitoring equipment and supervision provided by the local jail or detention center, or to pay for any damage to the monitoring equipment in the offender's possession or the failure to return the equipment to the program;

(2) To pay travel and other such expenses of the offender necessitated by his home arrest employment or participation in an educational or rehabilitative program;

(3) To provide support and maintenance for the offender's dependents or to make payments to the local department of family and children services or probation, as appropriate, on behalf of any offender's dependents receiving public assistance;

(4) To pay any fines, restitution, or other costs ordered by the court; and

(5) Any balance remaining after payment of costs and expenses listed in paragraphs (1) through (4) of this subsection shall be retained to the credit of the offender and shall be paid to him upon release from confinement.

(g) No offender participating in home arrest pursuant to this Code section shall be deemed to be an agent, employee, or involuntary servant of the county while working or participating in educational or other habilitative programs or while traveling to or from the place of employment.

(h) Local jails shall qualify for compensation for costs of incarceration of all persons pursuant to this Code section, less any payments from the offender pursuant to subsection (f) of this Code section. (Code 1981, § 42-1-8, enacted by Ga. L. 1991, p. 1348, § 1.)

**Code Commission notes.** — Ga. L. 1991, p. 1319, § 1, Ga. L. 1991, p. 1348, § 1, and Ga. L. 1991, p. 1352, § 1, all purport to enact Code Section 42-1-7. Pursuant to Code Section 28-9-5, Ga. L. 1991, p. 1348, § 1, has been renumbered as Code Section 42-1-8

and Ga. L. 1991, p. 1352, § 1, has been renumbered as Code Section 42-1-9.

**Law reviews.** — For note on 1991 enactment of this Code section, see 8 Ga. St. U.L. Rev. 155 (1992).

**42-1-9. Work-release, educational, and habilitative programs for county prisoners.**

(a) As used in this Code section, the term:

(1) "Educational program" means a program of learning recognized by the State Board of Education.

(2) "Habilitative program" means and includes an alcohol or drug treatment program, mental health program, family counseling, community service, or any other community program ordered or approved by the court having jurisdiction over the offender or by the sheriff.

(3) "Work release" means full-time employment or participation in an acceptable and suitable vocational training program.

(b) Notwithstanding the provisions of Code Section 42-1-4, any person who is confined in a county jail (1) after conviction and sentencing, (2) pending completion of a presentencing report, or (3) after return for a violation of the terms of probation may, in the discretion of the sheriff and subject to the eligibility requirements set forth in subsection (d) of this Code section, be assigned to a work-release program under supervision of the sheriff. If it appears to the court that an offender subject to its jurisdiction is a suitable candidate for a work-release program, the court may, subject to the eligibility requirements of subsection (d) of this Code section, order the offender to a work-release program. Further, the sheriff or the court may authorize the offender inmate to participate in educational or other habilitative programs designed to supplement work release.

(c) Whenever the sheriff assigns an inmate to work release, the court which sentenced such offender or before which such offender's case is pending shall be notified in writing by the sheriff or the director or administrator of the work-release program to which the offender is assigned of the offender's place of employment and the location of any educational or habilitative program in which the offender participates. The court, in its discretion, may revoke the authority for any inmate to participate in work release, whether such inmate was assigned to work release by the court or the sheriff. The sheriff or work-release director or administrator may enter into an agreement to accept into the local work-release program inmates who are sentenced to work release or who have met all work-release standards.

(d) In order to qualify for assignment to a work-release program, an offender:

(1) May not be subject to any outstanding warrants or orders from any other court or law enforcement agency;

(2) Shall not have any criminal record or any history within the preceding five years of any assaultive offenses of an aggravated nature,



including, but not limited to, aggravated assault; aggravated battery; rape; child molestation; robbery; trafficking or distribution of a controlled substance or marijuana; homicide by vehicle; felony bail-jumping; or escape; or

(3) May not have any life-threatening illnesses or disabilities that would interfere with the ability to work on a regular schedule.

(e) An inmate's employment under this Code section shall be with a legitimate, recognized, and established employer. An inmate assigned to a work-release program who, without proper authority, leaves the work area or site to which he is assigned, who leaves or fails to attend an assigned educational or other rehabilitative program, or who leaves the vehicle or route of travel in going to or returning from his assigned place of work shall be guilty of a misdemeanor. An offender who is found guilty of misdemeanor escape in accordance with this subsection shall be ineligible for further participation during his current term of confinement.

(f) Any wages earned by an inmate in work release under this Code section may, upon order of the court or the sheriff, be paid to the director or administrator of the work-release program after standard payroll deductions required by federal or state law have been withheld. Distribution of such wages shall be made for the following purposes:

(1) To defray the cost of the inmate's keep, confinement, and supervision, which sums shall be paid into the general treasury;

(2) To pay travel and other such expenses of the inmate necessitated by his work-release employment or participation in an educational or rehabilitative program;

(3) To provide support and maintenance for the inmate's dependents or to make payments to the local department of family and children services or probation, as appropriate, on behalf of any inmate's dependents receiving public assistance;

(4) To pay any fines, restitution, or other costs ordered by the court; and

(5) Any balance remaining after payment of costs and expenses listed in paragraphs (1) through (4) of this subsection shall be retained to the credit of the inmate and shall be paid to him upon release from confinement.

(g) No inmate participating in work release pursuant to this Code section shall be deemed to be an agent, employee, or involuntary servant of the county while working or participating in educational or other rehabilitative programs or while traveling to or from the place of employment.

(h) Local jails shall qualify for compensation for costs of incarceration of all persons pursuant to this Code section, less any payments from the

inmate pursuant to subsection (f) of this Code section. (Code 1981, § 42-1-9, enacted by Ga. L. 1991, p. 1352, § 1.)

**Cross references.** — Work-release programs for county prisoners, § 42-1-4.

**Code Commission notes.** — Ga. L. 1991, p. 1319, § 1, Ga. L. 1991, p. 1348, § 1, and Ga. L. 1991, p. 1352, § 1, all purport to enact Code Section 42-1-7. Pursuant to Code Section 28-9-5, Ga. L. 1991, p. 1348, § 1, has been renumbered as Code Section 42-1-8 and Ga. L. 1991, p. 1352, § 1, has been renumbered as Code Section 42-1-9.

Pursuant to Code Section 28-9-5, in 1991, "work-release program" was substituted for

"work release program" in three places in subsection (b), twice in subsection (c), in subsections (d) and (e), in the introductory language of subsection (f), and in paragraph (2) of subsection (f); and "work-release" was substituted for "work release" preceding "director" and "standards" in subsection (c).

**Law reviews.** — For note on 1991 enactment of this Code section, see 8 Ga. St. U.L. Rev. 155 (1992).

#### **42-1-10. Preliminary urine screen drug tests.**

(a) Any probation officer, parole officer, or other official or employee of the Department of Corrections who supervises any person covered under the provisions of paragraphs (1) through (7) of this subsection shall be exempt from the provisions of Chapter 22 of Title 31 for the limited purposes of administering a preliminary urine screen drug test to any person who is:

- (1) Incarcerated;
- (2) Released as a condition of probation for a felony or misdemeanor;
- (3) Released as a condition of conditional release;
- (4) Released as a condition of parole;
- (5) Released as a condition of provisional release;
- (6) Released as a condition of pretrial release; or
- (7) Released as a condition of control release.

(b) The Department of Corrections and the State Board of Pardons and Paroles shall develop a procedure for the performance of preliminary urine screen drug tests in accordance with the manufacturer's standards for certification. Probation officers, parole officers, or other officials or employees of the Department of Corrections who are supervisors of any person covered under paragraphs (1) through (7) of subsection (a) of this Code section shall be authorized to perform preliminary urine screen drug tests in accordance with such procedure. Such procedure shall include instructions as to a confirmatory test by a licensed clinical laboratory where necessary. (Code 1981, § 42-1-10, enacted by Ga. L. 1992, p. 3234, § 1.)

**42-1-11. Notification of crime victim of impending release of offender from imprisonment.**

(a) As used in this Code section, the term:

(1) "Crime" means an act committed in this state which constitutes any violation of Chapter 5 of Title 16, relating to crimes against persons; Chapter 6 of Title 16, relating to sexual offenses; Article 1 or Article 3 of Chapter 7 of Title 16, relating to burglary and arson; or Article 1 or Article 2 of Chapter 8 of Title 16, relating to offenses involving theft and armed robbery.

(2) "Crime against the person or sexual offense" means any crime provided for in Chapter 5 or 6 of Title 16.

(3) "Custodial authority" means the commissioner of corrections if the offender is in the physical custody of the state, or the sheriff if the offender is incarcerated in a county jail, or the warden if the offender is incarcerated in a county correctional institution.

(4) "Offender" means a person sentenced to a term of incarceration in a state or county correctional institution.

(b) If the identity of a victim of a crime has been verified by the prosecuting attorney, who has, at the request of such victim, mailed a letter to the custodial authority requesting that the victim be notified of a change in the custodial status of an offender, then the custodial authority shall make a good faith effort to notify the victim that the offender is to be released from imprisonment, including release on extended furlough; transferred to work release; released by mandatory release upon expiration of sentence; or has escaped from confinement; or if the offender has died. The good faith effort to notify the victim must occur prior to the release or transfer noted in this subsection. For a victim of a felony crime against the person or sexual offense for which the offender was sentenced to a term of imprisonment of more than 18 months, the good faith effort to notify the victim must occur no later than ten days before the offender's release from imprisonment, transfer to or release from work release, or as soon thereafter as is practical in situations involving emergencies.

(c) The notice given to a victim of a crime against a person or sexual offense must include the conditions governing the offender's release or transfer and either the identity of the corrections agent or the county officer who will be supervising the offender's release or a means to identify the agency that will be supervising the offender's release. The custodial authority complies with this Code section upon mailing the notice of impending release to the victim at the address which the victim has most recently provided to the custodial authority in writing.

(d) If an offender escapes from imprisonment or incarceration, including from release on extended furlough or work release, the custodial



authority shall make all reasonable efforts to notify a victim who has requested notice of the offender's release under subsection (b) of this Code section within six hours after discovering the escape, or as soon thereafter as is practical, and shall also make reasonable efforts to notify the victim within 24 hours after the offender is apprehended or as soon thereafter as is practical. In emergencies, telephone notification for the victim will be attempted and the results documented in the offender's central file.

(e) All identifying information regarding the victim, including the victim's request and the notice provided by the custodial authority, shall be confidential and accessible only to the victim. It is the responsibility of the victim to provide the custodial authority with a current address.

(f) A designated official in the Department of Corrections, the county correctional facility, and the sheriff's office shall coordinate the receipt of all victim correspondence and shall monitor staff responses to requests for such notification from victims of crime.

(g) The custodial authority shall not be liable for a failure to notify the victim. (Code 1981, § 42-1-11, enacted by Ga. L. 1993, p. 1278, § 1; Ga. L. 1995, p. 385, § 3.)

**The 1995 amendment**, effective July 1, 1995, in subsection (a), deleted former paragraph (1), relating to the definition of "commissioner", and redesignated former paragraphs (2) and (3) as present paragraphs (1) and (2); in present paragraph (1), deleted "a crime as defined by state or federal law and which results in physical injury or death to the victim" and added the language beginning "any violation of Chapter 5"; in present paragraph (2), inserted "or sexual offense" and "or 6"; added present paragraph (3) and deleted former paragraph (5), relating to the definition of "victim"; in subsection (b), substituted "prosecuting attorney" for "district attorney", substituted "custodial authority" for "commissioner of corrections" and "commissioner of corrections or the commissioner's designee", respectively, in the first sentence, inserted "or sexual offense" near the beginning and a comma following "release" near the end of the third sentence; rewrote subsection (c); in subsection (d), deleted "commissioner or other" preceding "custodial" near the be-

ginning; in subsection (e), substituted "custodial authority" for "commissioner or the commissioner's designee" and "commissioner", respectively; inserted ", the county correctional facility, and the sheriff's office" in subsection (f); and substituted "custodial authority" for "commissioner and the Department of Corrections" in subsection (g).

**Editor's notes.** — Section 2 of Ga. L. 1993, p. 1278, not codified by the General Assembly, provided that this Code section shall become effective six months after the effective date of an appropriations Act containing a specific appropriation to fund the provisions of this Act. Partial funding was provided by the General Assembly at the 1995 session. Additional funding was approved by the General Assembly at the 1997 session. Additional funding was appropriated by the General Assembly at the 1997 session.

**Law reviews.** — For note on 1993 enactment of this section, see 10 Ga. St. U.L. Rev. 176 (1993). For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 158 (1995).

**42-1-12. Registration of sexually violent predators.**

(a) As used in this Code section, the term:

(1) "Appropriate state official" means:

(A) With respect to an offender who is sentenced to probation without any sentence of incarceration in the state prison system, the sentencing court;

(B) With respect to an offender who is sentenced to a period of incarceration in a prison under the jurisdiction of the Department of Corrections and who is subsequently released from prison or placed on probation, the commissioner of corrections or his or her designee; and

(C) With respect to an offender who is placed on parole, the chairperson of the State Board of Pardons and Paroles or his or her designee.

(2) "Board" means the Sexual Offender Registration Review Board.

(3) "Conviction" includes a final judgment of conviction entered upon a verdict or finding of guilty of a crime or upon a plea of guilty. Unless otherwise required by federal law, a defendant who is discharged without adjudication of guilt and who is not considered to have a criminal conviction pursuant to Article 3 of Chapter 8 of this title, relating to first offenders, shall not be subject to the registration requirements of this Code section.

(4) (A) "Criminal offense against a victim who is a minor" means any criminal offense under Title 16 or any offense under federal law or the laws of another state or territory of the United States which consists of:

(i) Kidnapping of a minor, except by a parent;

(ii) False imprisonment of a minor, except by a parent;

(iii) Criminal sexual conduct toward a minor;

(iv) Solicitation of a minor to engage in sexual conduct;

(v) Use of a minor in a sexual performance;

(vi) Solicitation of a minor to practice prostitution; or

(vii) Any conduct that by its nature is a sexual offense against a minor.

(B) For purposes of this paragraph, conduct which is criminal only because of the age of the victim shall not be considered a criminal offense if the perpetrator is 18 years of age or younger.

(5) "Mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person

in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

(6) "Predatory" means an act directed at a stranger or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

(7) "Sexually violent offense" means a conviction for violation of Code Section 16-6-1, relating to rape; Code Section 16-6-2, relating to aggravated sodomy; Code Section 16-6-4, relating to aggravated child molestation; Code Section 16-6-22.1, relating to sexual battery; or Code Section 16-6-22.2, relating to aggravated sexual battery; or an offense that has as its element engaging in physical contact with another person with intent to commit such an offense; or a conviction in a federal court or court of another state or territory for any offense which under the laws of this state would be classified as a violation of a Code section listed in this paragraph.

(8) "Sexually violent predator" means a person who has been convicted on or after July 1, 1996, of a sexually violent offense and who suffers from a mental abnormality or personality disorder or attitude that places the person at risk of perpetrating any future predatory sexually violent offenses.

(b) (1) (A) (i) On and after July 1, 1996, a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense shall register his or her name and current address; place of employment, if any; the crime of which convicted; and the date released from prison or placed on parole; supervised release, or probation with the Georgia Bureau of Investigation for the time period specified in paragraph (1) of subsection (g) of this Code section.

(ii) A person who has previously been convicted of a criminal offense against a victim who is a minor or who has previously been convicted of a sexually violent offense and who is released from prison or placed on parole, supervised release, or probation on or after July 1, 1996, shall register his or her name and current address; place of employment, if any; the crime of which convicted; and the date released from prison or placed on parole, supervised release, or probation with the Georgia Bureau of Investigation for the time period specified in paragraph (1) of subsection (g) of this Code section.

(B) A person who is a sexually violent predator shall register the information required under subparagraph (A) of this paragraph with the Georgia Bureau of Investigation until such requirement is terminated under paragraph (2) of subsection (g) of this Code section.



(2) (A) A determination that a person is a sexually violent predator and a determination that a person is no longer a sexually violent predator shall be made by the sentencing court after receiving a report by the Sexual Offender Registration Review Board.

(B) The Sexual Offender Registration Review Board shall be composed of three professionals licensed under Title 43 and knowledgeable in the field of the behavior and treatment of sexual offenders. The members of such board shall be appointed by the commissioner of human resources for terms of four years with initial terms commencing September 1, 1996. After the initial terms specified in this subparagraph, members of the board shall take office on the first day of September immediately following the expired term of that office and shall serve for a term of four years and until the appointment of their respective successors. No member shall serve on the board more than two consecutive terms. Vacancies occurring on the board, other than those caused by expiration of a term of office, shall be filled in the same manner as the original appointment to the position vacated for the remainder of the unexpired term and until a successor is appointed. Members shall be entitled to an expense allowance and travel cost reimbursement the same as members of certain other boards and commissions as provided in Code Section 45-7-21.

(C) Upon a determination that an offender is guilty of a sexually violent offense, the court may request a report from the Sexual Offender Registration Review Board as to the likelihood that the offender suffers from a mental abnormality or personality disorder that would make the person likely to engage in a predatory sexually violent offense. The report shall be requested as a matter of course for any offender with a history of sexually violent offenses. The court shall provide the Sexual Offender Registration Review Board with any information available to assist the board in rendering an opinion. The board shall have 60 days from receipt of the court's request to respond with its report. Within 60 days of receiving the report, the court shall issue a ruling as to whether or not the offender shall be classified as a sexually violent predator. If the court determines the offender to be a sexually violent predator, such fact shall be communicated in writing to the appropriate state official and to the Georgia Bureau of Investigation.

(D) An offender who has been determined to be a sexually violent predator and who is required to register under this Code section may make application to the board to have such registration requirements terminated on the grounds that such person no longer suffers from a mental abnormality or personality disorder that would make the person likely to engage in a predatory sexually violent offense. Such an application may be made by the offender and heard by the board only

after the offender has been released on parole or probation or from incarceration for a period of three years and not more than once every two years thereafter. If the board determines that such offender should no longer be classified as a sexually violent predator, such information shall be forwarded to the sentencing court, where a final decision on the matter shall be rendered. If the court concurs with the board's recommendation, such information shall be forwarded to the Georgia Bureau of Investigation and the registration requirements of subparagraph (B) of paragraph (1) of this subsection shall no longer apply to such offender; provided, however, that an individual who is no longer deemed a sexually violent predator shall be required to register under subparagraph (A) of paragraph (1) of this subsection for the time period specified in paragraph (1) of subsection (g) of this Code section. If such a determination is not made by the court to terminate the registration requirements, the offender shall be required to continue to comply with the registration requirements of subparagraph (B) of paragraph (1) of this subsection.

(3) (A) If a person who is required to register under this Code section is released from prison or placed on parole, supervised release, or probation, the appropriate state official shall:

(i) Inform the person of the duty to register and obtain the information required under subparagraph (A) of paragraph (1) of this subsection for such registration;

(ii) Inform the person that, if the person changes residence address, the person shall give the new address to the Georgia Bureau of Investigation not later than ten days after the change of address;

(iii) Inform the person that, if the person changes residence to another state, the person shall register the new address with the Georgia Bureau of Investigation, and that the person shall also register with a designated law enforcement agency in the new state not later than ten days after establishing residence in the new state if the new state has a registration requirement;

(iv) Obtain fingerprints and a photograph of the person if such fingerprints and photograph have not already been obtained in connection with the offense that triggered the initial registration; and

(v) Require the person to read and sign a form stating that the duty of the person to register under this Code section has been explained.

(B) In addition to the requirements of subparagraph (A) of this paragraph, for a person required to register under subparagraph (B) of paragraph (1) of this subsection, the appropriate state official shall

obtain the name of the person; descriptive physical and behavioral information to assist law enforcement personnel in identifying the person; known current or proposed residence addresses of the person; place of employment, if any; offense history of the person; and documentation of any treatment received for any mental abnormality or personality disorder of the person; provided, however, that the appropriate state official shall not be required to obtain any information already on the criminal justice information system of the Georgia Crime Information Center.

(C) The Georgia Crime Information Center shall create criminal justice information system network transaction screens by which appropriate state officials shall enter original data required by this Code section. Screens shall also be created for sheriffs' offices for the entry of record confirmation data, changes of residence, employment or other pertinent data, and to assist in offender identification.

(D) Any person changing residence from another state or territory of the United States to Georgia who is required to register under federal law or the laws of another state or territory or who has been convicted of an offense in another state or territory which would require registration under this Code section if committed in this state shall comply with the registration requirements of this Code section. Such person shall register the new address with the designated law enforcement agency with whom the person last registered, and the person shall register with the Georgia Bureau of Investigation not later than ten days after the date of establishing residency in this state. The Georgia Bureau of Investigation shall obtain any needed information concerning the registrant, including fingerprints and a photograph of the person if such fingerprints and photograph have not already been obtained in connection with the offense that resulted in the initial registration requirement. In addition, the Georgia Bureau of Investigation shall inform the person of the duty to report any change of address as otherwise required in this Code section. The Georgia Bureau of Investigation shall forward such information in the manner described in subsection (c) of this Code section.

(c) The appropriate state official shall, within three days after receipt of information described in paragraph (3) of subsection (b) of this Code section, forward such information to the Georgia Bureau of Investigation. Once the data is entered into the criminal justice information system by the appropriate state official or sheriff, the Georgia Crime Information Center shall immediately notify the sheriff of the county where the person expects to reside. The Georgia Bureau of Investigation shall also immediately transmit the conviction data and fingerprints to the Federal Bureau of Investigation. It shall be the duty of the sheriff of each county within this state to maintain a register of the names and addresses of all offenders



whose names have been provided by the Georgia Bureau of Investigation to the sheriff under this Code section. The Georgia Bureau of Investigation shall establish operating policies and procedures concerning record ownership, quality, verification, modification, and cancellation and shall perform mail out and verification duties on a quarterly basis. The Georgia Bureau of Investigation shall send each month criminal justice information system network messages to sheriffs listing offenders due for verification. The bureau shall also create a photo image file from original entries and provide such entries to sheriffs to assist in offender identification and verification.

(d) (1) For a person required to register under subparagraph (b)(1)(A) of this Code section, on each anniversary of the person's initial registration date during the period in which the person is required to register under this Code section the following applies:

(A) The Georgia Bureau of Investigation shall mail a nonforwardable verification form to the last reported address of the person;

(B) The person shall be required as a condition of parole or probation to respond directly to the sheriff within ten days after receipt of the form;

(C) The verification form stating that the person still resides at the address last reported to the Georgia Bureau of Investigation shall be signed by the person and retained by the sheriff; and

(D) If the person fails to respond directly to the sheriff within ten days after receipt of the form, the person shall be in violation of this Code section unless the person proves that he or she has not changed the residence address.

(2) The provisions of paragraph (1) of this subsection shall be applied to a person required to register under subparagraph (b)(1)(B) of this Code section, except that such person must verify the registration every 90 days after the date of the initial release on probation by the court or the initial release by the Department of Corrections or commencement of parole.

(e) A change of address by a person required to register under this Code section reported to the Georgia Bureau of Investigation shall be immediately reported to the sheriff of the county where the person resides. The Georgia Bureau of Investigation shall, if the person changes residence to another state, notify the law enforcement agency with which the person must register in the new state if the new state has a registration requirement.

(f) A person who has been convicted of an offense which requires registration under this Code section shall register the new address with a designated law enforcement agency in another state to which the person

moves not later than ten days after such person establishes residence in the new state if the new state has a registration requirement.

(g) (1) A person required to register under subparagraph (b)(1)(A) of this Code section shall continue to comply with this Code section until ten years have elapsed since the person was released from prison or placed on parole, supervised release, or probation.

(2) The requirement of a person to register under subparagraph (b)(1)(B) of this Code section shall terminate upon a determination, made in accordance with paragraph (2) of subsection (b) of this Code section, that the person no longer suffers from a mental abnormality or personality disorder that would make the person likely to engage in a predatory sexually violent offense.

(h) Any person who is required to register under this Code section and who fails to comply with the requirements of this Code section or who provides false information shall be guilty of a misdemeanor; provided, however, that upon the conviction of the third or subsequent offense under this subsection, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than three years.

(i) The information collected under the state registration program shall be treated as private data except that:

(1) Such information may be disclosed to law enforcement agencies for law enforcement purposes;

(2) Such information may be disclosed to government agencies conducting confidential background checks;

(3) The Georgia Bureau of Investigation or any sheriff maintaining records required under this Code section shall release relevant information collected under this Code section that is necessary to protect the public concerning those persons required to register under this Code section, except that the identity of a victim of an offense that requires registration under this Code section shall not be released. In addition to any other notice that may be necessary to protect the public, nothing herein shall prevent any sheriff from posting this information in any public building; and

(4) It shall be the responsibility of the sheriff maintaining records required under this Code section to enforce the criminal provisions of this Code section. The sheriff may request the assistance of the Georgia Bureau of Investigation upon his or her discretion.

(j) Law enforcement agencies, employees of law enforcement agencies, members of the Sexual Offender Registration Review Board, and state officials shall be immune from liability for good faith conduct under this Code section.

(k) The provisions of this Code section shall be in addition to and not in lieu of the provisions of Code Section 42-9-44.1, relating to conditions for parole of sexual offenders.

(l) The Board of Public Safety is authorized to promulgate rules and regulations necessary for the Georgia Bureau of Investigation and the Georgia Crime Information Center to implement and carry out the provisions of this Code section. (Code 1981, § 42-1-12, enacted by Ga. L. 1996, p. 1520, § 1; Ga. L. 1997, p. 143, § 42; Ga. L. 1997, p. 380, § 1.)

**Effective date.** — This Code section became effective July 1, 1996.

**The 1997 amendments.** — The first 1997 amendment, effective March 28, 1997, part of an Act to correct errors and omissions in the Code, substituted “subparagraph (A) of paragraph (1) of this subsection” for “subparagraph (b)(1)(A)” in division (b)(3)(A)(i) and revised language in subsection (c). The second 1997 amendment, effective July 1, 1997, in subsection (a), substituted “or any offense under federal law or the laws of another state or territory of the United States which” for “of this Code that” in subparagraph (A) of paragraph (4); and substituted “any offense” for “a felony offense” near the end of paragraph (7); deleted “of this Code” following “Title 43” in the first sentence of subparagraph (b)(2)(B); in subparagraph (b)(2)(D), inserted “subparagraph (B) of paragraph (1)” in two places, substituted “subsection” for “Code section” in two places, and inserted “; provided, however, that an individual who is no longer deemed a sexually violent predator shall be required to register under subparagraph (A) of paragraph (1) of this subsection for the time period specified in para-

graph (1) of subsection (g) of this Code section” at the end of the fourth sentence; in subparagraph (b)(3)(A), substituted “Georgia Bureau of Investigation” for “sheriff with whom the person last registered” in divisions (b)(3)(A)(ii) and (b)(3)(A)(iii), substituted “subparagraph (A) of paragraph (1) of this subsection” for “subparagraph (b)(1)(A)” in division (b)(3)(A)(i), and added “not later than ten days after the change of address” at the end of division (b)(3)(A)(ii); added subparagraph (b)(3)(D); and, in the first sentence in paragraph (3) of subsection (i), substituted “shall release” for “is authorized to release”, substituted “those persons” for “a specific person”, and added the second sentence.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, “Sexual Offender Registration Review Board” was substituted for “Sex Offender Registration Review Board” in the first and third sentences of subparagraph (b)(2)(C) and in subsection (j).

**Law reviews.** — For review of 1996 department of corrections legislation, see 13 Ga. U. L. Rev. 257.



CHAPTER 2

BOARD AND DEPARTMENT OF CORRECTIONS

Sec.		Sec.	
42-2-1.	Definitions.	42-2-9.	Selection of department personnel; establishment and maintenance of roster of employees.
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42-2-3.	Board meetings.	42-2-11.	Powers and duties of board; adoption of rules and regulations.
42-2-4.	Department created.	42-2-12.	Reasonableness of rules and regulations.
42-2-5.	Administrative functions of department.	42-2-13.	Grants to municipal corporations and counties for local jails and correctional institutions.
42-2-5.1.	Special school district for school age youth; education programs for adult offenders.	42-2-14.	Power of Governor to declare state of emergency with regard to jail and prison overcrowding.
42-2-6.	Office of commissioner created; general duties; appointment; compensation.		
42-2-7.	Duties of commissioner relating to department retirements.		
42-2-8.	Additional duties of commissioner.		

**Editor's notes.** — Ga. L. 1985, p. 283, § 1 changed the name of the Department of Offender Rehabilitation, the Board of Offender Rehabilitation, and the commissioner of offender rehabilitation to the Department of Corrections, the Board of Corrections, and the commissioner of corrections, respectively, and amended sections throughout the Code to conform to the change. Section 2 of that Act, not codified by the General Assembly, provided as follows:

“For administrative convenience, equipment and supplies bearing the name Board of Offender Rehabilitation, Department of Offender Rehabilitation, or commissioner of offender rehabilitation may be used by the Board of Corrections, Department of Corrections, or commissioner of corrections as if such equipment or supplies bore the name Board of Corrections, Department of Corrections, or commissioner of corrections.”

RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 21, 22.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 14-19.

42-2-1. Definitions.

As used in this chapter, the term:

- (1) “Board” means the Board of Corrections.
- (2) “Commissioner” means the commissioner of corrections.
- (3) “Department” means the Department of Corrections. (Ga. L. 1982, p. 3, § 42; Ga. L. 1985, p. 283, § 1.)

**42-2-2. Board members, officers, records, and compensation.**

(a) On and after July 1, 1983, the board shall consist of one member from each congressional district in the state and five additional members from the state at large. All members shall be appointed by the Governor, subject to confirmation by the Senate. The initial terms of members shall be as follows: two members representative of congressional districts and one at-large member shall be appointed for a term ending July 1, 1984; two members representative of congressional districts and one at-large member shall be appointed for a term ending July 1, 1985; two members representative of congressional districts and one at-large member shall be appointed for a term ending July 1, 1986; two members representative of congressional districts and one at-large member shall be appointed for a term ending July 1, 1987; and two members representative of congressional districts and one at-large member shall be appointed for a term ending July 1, 1988. Thereafter, all members appointed to the board by the Governor shall be appointed for terms of five years and until their successors are appointed and qualified. In the event of a vacancy during the term of any member by reason of death, resignation, or otherwise, the appointment of a successor by the Governor shall be for the remainder of the unexpired term of such member.

(b) The first members appointed under this Code section shall be appointed for terms which begin July 1, 1983. The members of the board serving on April 1, 1983, shall remain in office until their successors are appointed and qualified.

(c) The board shall annually elect one of its members as chairman and shall elect from its membership a secretary of the board. The secretary of the board shall keep adequate records and minutes of all business and official acts of the board. Records of the board shall be maintained in the office of the commissioner.

(d) Each member of the Board of Corrections shall receive the sum provided for by Code Section 45-7-21 for each day of actual attendance at meetings of the board and for each day of travel as a member of a committee of the board. In addition, upon recommendation by the chairman or the board, each member shall receive for out-of-state travel actual expenses incurred in connection therewith and reimbursement for actual transportation costs while traveling by public carrier or the legal mileage rate for the use of a personal automobile in connection with such attendance. Such sums, expenses, and costs shall be paid from funds appropriated or otherwise available to the Department of Corrections. (Ga. L. 1956, p. 161, § 8; Ga. L. 1983, p. 507, § 2; Ga. L. 1984, p. 22, § 42; Ga. L. 1986, p. 179, § 1.)

**Editor's notes.** — Section 1 of Ga. L. 1983, this Act to implement certain changes required by Article III, Section VI, Paragraph p. 507 provides as follows: "It is the intent of

IV, subparagraph (b) of the Constitution of the State of Georgia."

#### **42-2-3. Board meetings.**

The board shall meet once each month in the office of the commissioner, unless in the discretion of a majority of the board it is necessary or convenient to meet elsewhere to carry out the duties of the board. Special meetings may be held at such times and places as shall be specified by the call of the chairman of the board or by the commissioner. The secretary of the board shall give written notice of the time and place of all meetings of the board to each member of the board and to the commissioner. Meetings of the board shall be open to the public. However, the board may hold executive sessions pursuant to Chapter 14 of Title 50 whenever it, in its discretion, deems advisable. Eight members of the board shall constitute a quorum for the transaction of business. (Ga. L. 1956, p. 161, § 7; Ga. L. 1987, p. 457, § 1.)

#### **42-2-4. Department created.**

There is created the Department of Corrections. (Ga. L. 1972, p. 1069, § 9; Ga. L. 1985, p. 283, § 1.)

### **OPINIONS OF THE ATTORNEY GENERAL**

**Liability for probationers' injuries.** — Neither the state, and particularly the Department of Offender Rehabilitation (Corrections) and its employees in their official capacities, may incur liability as a result of a probationer injured while performing court-ordered community service work except to the extent permitted by § 28-5-85. 1983 Op. Att'y Gen. No. 83-18.

Department of Offender Rehabilitation (Corrections) employees, authorized by law

to supervise probationers while they are performing approved court-ordered tasks under §§ 42-8-71, 42-8-72, and 42-8-73 are performing a governmental function as opposed to a ministerial task, and therefore will not be personally liable for injuries to the probationers sustained while performing the tasks unless the employees' conduct is willful and wanton. 1983 Op. Att'y Gen. No. 83-18.

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 21.

#### **42-2-5. Administrative functions of department.**

The department shall administer the state's correctional institutions and the rehabilitative programs conducted therein. (Ga. L. 1972, p. 1069, § 15; Ga. L. 1978, p. 1647, § 4.)



**Administrative rules and regulations.** — Institutional, center, and program services, Official Compilation of Rules and Regula-

tions of State of Georgia, Rules of Georgia Board of Offender Rehabilitation, Chapters 415-41 through 415-47.

### OPINIONS OF THE ATTORNEY GENERAL

**Collection of child support payments.** — The Department of Offender Rehabilitation (Corrections) should collect child support payments for individuals between the ages of

18 and 21 when such payments arise out of court orders in existence prior to July 1, 1972. 1972 Op. Att'y Gen. No. U72-40.

#### **42-2-5.1. Special school district for school age youth; education programs for adult offenders.**

(a) In order to provide education for any school age youths incarcerated within any facility of the Department of Corrections, the department shall be considered a special school district which shall be given the same funding consideration for federal funds that school districts within the state are given. The special school district under the department shall have the powers, privileges, and authority exercised or capable of exercise by any other school district. The schools within the special school district shall be under the control of the commissioner, who shall serve as the superintendent of schools for such district. The Board of Corrections shall serve as the board of education for such district. The board, acting alone or in cooperation with the State Board of Education, shall establish education standards for the district. As far as is practicable, such standards shall adhere to the standards adopted by the State Board of Education for the education of school age youth, while taking into account:

(1) The overriding security needs of correctional institutions and other restrictions inherent to the nature of correctional facilities;

(2) The effect of limited funding on the capability of the Department of Corrections to meet certain school standards; and

(3) Existing juvenile education standards of the Correctional Education Association and the American Correctional Association, which shall be given primary consideration where any conflicts arise.

(b) The effect of subsection (a) of this Code section shall not be to provide state funds to the special school district under the department through Part 4 of Article 6 of Chapter 2 of Title 20.

(c) The Board of Corrections, acting alone or in cooperation with the State Board of Technical and Adult Education or other relevant education agencies, shall provide overall direction of educational programs for adult offenders in the correctional system and shall exercise program approval authority. The board may enter into written agreements with other educational organizations and agencies in order to provide adult offenders with such education and employment skills most likely to encourage gainful

employment and discourage return to criminal activity upon release. The board may also enter into agreements with other educational organizations and agencies to attain program certification for its vocational and technical education programs. (Code 1981, § 42-2-5.1, enacted by Ga. L. 1995, p. 357, § 1.)

**Effective date.** — This Code section became effective April 7, 1995.

#### **42-2-6. Office of commissioner created; general duties; appointment; compensation.**

(a) There is created the position of commissioner of corrections. The commissioner shall be the chief administrative officer of the department. Subject to the general policy established by the board, the commissioner shall supervise, direct, account for, organize, plan, administer, and execute the functions vested in the department by this title.

(b) The commissioner shall be appointed by and shall serve at the pleasure of the board. The salary, expenses, and allowances of the commissioner shall be as set by statute. (Ga. L. 1972, p. 1069, § 11; Ga. L. 1978, p. 1647, § 2; Ga. L. 1985, p. 283, § 1.)

### **JUDICIAL DECISIONS**

**Cited in** *Busbee v. Reserve Ins. Co.*, 147 Ga. App. 451, 249 S.E.2d 279 (1978); *State v. Roulain*, 159 Ga. App. 233, 283 S.E.2d 89 (1981).

### **OPINIONS OF THE ATTORNEY GENERAL**

**Duty to maintain records of tort actions.** — The commissioner of offender rehabilitation (corrections) should maintain any records related to possible tort action for at least two years after a possible tort occurs. 1972 Op. Att'y Gen. No. 72-75.

**Penal institution in Georgia** is any facility used to punish criminal offenders. 1980 Op. Att'y Gen. No. 80-121.

**Designation of places for carrying out execution.** — Present law limits the place of execution only to penal institutions other than the old prison farm in Baldwin County. The commissioner is authorized to designate any such penal institution as the place for carrying out an execution. 1980 Op. Att'y Gen. No. 80-121.

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 21. 63A Am. Jur. 2d, Public Officers and Employees, §§ 26,

93-97, 223, 298-304, 431-434, 448-453.

**C.J.S.** — 67 C.J.S., Officers, §§ 219, 223-227.

**42-2-7. Duties of commissioner relating to department retirements.**

The commissioner shall act for the department for and in compliance to any retirement provisions for the employees and officials of the department. (Ga. L. 1961, p. 124, § 1.)

**42-2-8. Additional duties of commissioner.**

The commissioner shall direct and supervise all the administrative activities of the board and shall attend all meetings of the board. The commissioner shall also make, publish, and furnish to the General Assembly and to the Governor annual reports regarding the work of the board, along with such special reports as he or she may consider helpful in the administration of the penal system or as may be directed by the board. The commissioner shall perform such other duties and functions as are necessary or desirable to carry out the intent of this chapter and which he or she may be directed to perform by the board. The commissioner or the commissioner's designee shall be authorized to make and execute contracts and all other instruments necessary or convenient for the acquisition of professional and personal employment services and for the leasing of real property. Subject to legislative appropriations, the commissioner shall also be authorized to make and execute any contract for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state correctional institution or for any services pertaining to the custody, care, and control of inmates or other functions as are related to the discharge of these responsibilities and to designate any person or organization with whom the commissioner contracts as a law enforcement unit under paragraph (7) of Code Section 35-8-2. (Ga. L. 1956, p. 161, § 9; Ga. L. 1958, p. 413, § 1; Ga. L. 1962, p. 689, § 1; Ga. L. 1966, p. 121, § 1; Ga. L. 1988, p. 1448, § 1; Ga. L. 1996, p. 691, § 1.)

The 1996 amendment, effective April 8, 1996, inserted "or she" in the second and third sentences; substituted "the commis-

sioner's" for "his" in the fourth sentence; and added the last sentence.

**JUDICIAL DECISIONS**

Cited in *State v. MacDougall*, 139 Ga. App. 815, 229 S.E.2d 667 (1976); *Busbee v. Re-*

*serve Ins. Co.*, 147 Ga. App. 451, 249 S.E.2d 279 (1978).

**OPINIONS OF THE ATTORNEY GENERAL**

**Determination of mental disease and transfer to mental hospital.** — This section, and §§ 42-2-9, 42-2-11 and 42-5-52 indicate that the director (now commissioner) of corrections is authorized to determine

whether or not an inmate is mentally diseased and should be transferred to a state mental hospital. 1968 Op. Att'y Gen. No. 68-136.



### 42-2-9. Selection of department personnel; establishment and maintenance of roster of employees.

The commissioner is authorized to appoint and employ such clerical force as is necessary to carry on the administration of the penal system. He may also employ such experts and technical help as are needed, along with assistants to the commissioner, wardens, superintendents, guards, and other employees necessary for the operation of the state operated institutions where inmates are confined. The commissioner shall establish and maintain in his office a complete roster of all employees in his office and in each of the various institutions operating under the authority of the board. (Ga. L. 1956, p. 161, § 10; Ga. L. 1984, p. 940, § 1.)

### OPINIONS OF THE ATTORNEY GENERAL

**Determination of mental disease and transfer to mental hospital.** — This section, and §§ 42-2-8, 42-2-11, and 42-5-52 indicate that the director (now commissioner) of corrections is authorized to determine whether or not an inmate is mentally diseased and should be transferred to a state mental hospital. 1968 Op. Att'y Gen. No. 68-136.

**Wardens are employees of state or counties.** — The law provides for two types of wardens: those at "state-operated institutions" under this section, and those "appointed by the governing authority of the county" under § 42-5-30; a person cannot be a warden within the state penal system unless he is an employee either of the state or a county authorized to maintain a county correctional institution under the supervision of the Board of Corrections. 1973 Op. Att'y Gen. No. 73-72.

**Duty of selecting and employing wardens** is vested exclusively in Board of Corrections and the director (now commissioner) thereof; the board and its director (now commissioner) are to exercise their informed and expert judgment in selecting and discharging such officials, and any contract or agreement whereby they seek to divest themselves of that discretion, power, and judgment is void as being contrary to public policy. 1958-59 Op. Att'y Gen. p. 241 (rendered prior to 1984 amendment).

**Supplementing employee salaries.** — Department of Offender Rehabilitation (Corrections) may supplement salaries of teachers at Georgia Industrial Institute who are provided by local board of education. 1962 Op. Att'y Gen. p. 162.

### RESEARCH REFERENCES

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, § 15.

### 42-2-10. Office of board, commissioner, and staff.

The executive office of the board and the commissioner shall be located in the City of Atlanta, and suitable quarters shall be assigned to the board and the commissioner and to his staff of employees. (Ga. L. 1956, p. 161, § 27.)

## JUDICIAL DECISIONS

Cited in *Busbee v. Reserve Ins. Co.*, 147 Ga. App. 451, 249 S.E.2d 279 (1978).

**42-2-11. Powers and duties of board; adoption of rules and regulations.**

(a) The board shall establish the general policy to be followed by the department and shall have the duties, powers, authority, and jurisdiction provided for in this title or as otherwise provided by law.

(b) The board is authorized to adopt, establish, and promulgate rules and regulations governing the transaction of the business of the penal system of the state by the department and the commissioner and the administration of the affairs of the penal system in the different penal institutions coming under its authority and supervision and shall make the institutions as self-supporting as possible.

(c) The board shall adopt rules governing the assignment, housing, working, feeding, clothing, treatment, discipline, rehabilitation, training, and hospitalization of all inmates coming under its custody.

(d) The board shall also adopt rules and regulations governing the conduct and the welfare of the employees of the state institutions operating under its authority and of the county correctional institutions and correctional facilities or programs operating under its supervision. It shall prescribe the working hours and conditions of work for employees in the office of the commissioner and in institutions operating under the authority of the board.

(e) The board shall also adopt rules and regulations governing the negotiation and execution of any contract for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state correctional institution or for any services pertaining to the custody, care, and control of inmates or other functions as are related to the discharge of these responsibilities.

(f) The board shall adopt rules:

(1) Providing for the transfer to a higher security facility of each inmate who commits battery or aggravated assault against a correctional officer while in custody; provided, however, that this provision shall not apply in instances where the inmate is already incarcerated in a maximum security facility; and

(2) Specifying the procedures for offering department assistance to employees who are victims of battery or aggravated assault by inmates in filing criminal charges or civil actions against their assailants, including procedures for posting notices that such assistance is available to any employee who is subjected to battery or aggravated assault by an inmate, but not including legal representation of such employees.

(g) All rules and regulations adopted pursuant to this Code section shall be adopted, established, promulgated, amended, repealed, filed, and published in accordance with the applicable provisions and procedure as set forth in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." The courts shall take judicial notice of any such rules or regulations.

(h) As used in this Code section, the words "rules and regulations" shall have the same meaning as the word "rule" is defined in paragraph (6) of Code Section 50-13-2. (Ga. L. 1956, p. 161, § 11; Ga. L. 1969, p. 598, § 1; Ga. L. 1978, p. 1647, § 1; Ga. L. 1983, p. 3, §§ 31, 60; Ga. L. 1983, p. 507, § 3; Ga. L. 1996, p. 691, § 2; Ga. L. 1996, p. 726, § 1.)

**The 1996 amendments.** — The first 1996 amendment, effective April 8, 1996, added present subsection (e) and redesignated former subsections (e) and (f) as subsections (f) and (g), respectively. The second 1996 amendment, effective July 1, 1996, added subsection (f).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, subsection (g) as enacted by Ga. L. 1996, p. 726, § 1, was redesignated as subsection (f) and subsections (f) and (g) as enacted by Ga. L. 1996, 691, § 2, were redesignated as subsections (g) and (h), respectively.

**Editor's notes.** — Section 1 of Ga. L. 1983, p. 507 provides as follows: "It is the intent of this Act to implement certain changes required by Article III, Section VI, Paragraph IV, subparagraph (b) of the Constitution of the State of Georgia."

**Law reviews.** — For note, "Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia," see 8 Ga. L. Rev. 919 (1974). For review of 1996 department of corrections legislation, see 13 Ga. St. U. L. Rev. 253.

## JUDICIAL DECISIONS

**Authority for rules regarding drug testing.** — A rule authorizing the warden to "direct and manage" employees does not encompass the authority to order employees to submit to random drug testing. Any rule regarding drug testing of the employees of a penal institution operating under the authority of the Board of Corrections must be promulgated by the board rather than by the warden of the institution. *Department of Cors. v. Colbert*, 260 Ga. 255, 391 S.E.2d 759 (1990).

**Liability of warden for torts of inmates.** — Warden of a public works camp (now county correctional institution) will not be held liable for torts of convicts on mere averment that he was negligent "in permitting said convicts to roam the roads of this county and state in a truck, without any guard," whereby injuries resulted from a collision of the truck with the plaintiff's car, as it was discretionary with the warden to determine how and in what manner convicts employed outside the confines of the camp (now county correctional institution) doing work in connection

with its operation should be suffered to go at large, and wardens acting in a discretionary capacity will not be liable unless guilty of willfulness, fraud, malice, or corruption, or unless they knowingly act wrongfully, and not according to their honest convictions of duty. *Price v. Owen*, 67 Ga. App. 58, 19 S.E.2d 529 (1942) (decided under former Code 1933, §§ 77-307, 77-311, and 77-313 prior to revision by Ga. L. 1956, p. 101).

**Procedure for inmate to contest rules as to treatment.** — The complaint by an inmate of the invalidity of one or more of the department's rules, or for failure to apply and abide by one or more of the department's rules, or for violation of one or more of the department's rules, with respect to treatment, discipline, or conditions of confinement of the inmate must be asserted in an action against the director of the department of corrections (now commissioner of corrections), and such action must assert that administrative procedures provided by the department for the correction of such alleged complaints have been exhausted



prior to the filing of the action. *Brown v. Caldwell*, 231 Ga. 795, 204 S.E.2d 137 (1974).

**Injunctions against Board of Commissioners.** — An injunction will not lie against the prison commissioners (now Board of Corrections) where it interferes with their duties. *Southern Mining Co. v. Lowe*, 105 Ga.

352, 31 S.E. 191 (1898).

**Cited in** *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967); *Wilkes County v. Arrendale*, 227 Ga. 289, 180 S.E.2d 548 (1971); *Patterson v. MacDougall*, 506 F.2d 1 (5th Cir. 1975); *Conklin v. Zant*, 202 Ga. App. 528, 414 S.E.2d 741 (1992).

### OPINIONS OF THE ATTORNEY GENERAL

**Applicability to "state prisoners."** — This section and § 42-5-57 relate to "state prisoners," rather than "county prisoners"; the distinction between "state" and "county" prisoners continues in effect even though both may be confined in a county work camp (now county correctional institution). 1970 Op. Att'y Gen. No. U70-134.

**Use of profits generated in penal or correctional institution store.** — The Board of Corrections can use the profits generated in a prison store to offset the expense of employing an athletic director to direct the athletic activities of inmates, by withdrawing such sums from the prison athletic fund and depositing the same in the treasury of the Board of Corrections. 1969 Op. Att'y Gen. No. 69-314.

**Board authorized to develop service-type industrial programs.** — The Board of Corrections is authorized to develop service-type industrial programs such as furniture refinishing, but such programs may not be developed by the Georgia Prison Industries Ad-

ministration (now Georgia Correctional Industries Administration). 1970 Op. Att'y Gen. No. 70-156.

**Prison may farm county property and share crop with county.** — The Board of Corrections may enter into an agreement with a county whereby the county gives the prison a crop allotment and allows the prison to farm county property, furnishing the fertilizer and equipment for gathering the crop, and in return for which the county is to receive a portion of the crop grown on the property, with the remainder to be consumed within the prison branch. 1970 Op. Att'y Gen. No. 70-83.

**Determination of mental disease and transfer to mental hospital.** — This section, and §§ 42-2-8, 42-2-9, and 42-5-52 indicate that the director (now commissioner) of corrections is authorized to determine whether or not an inmate is mentally diseased and should be transferred to a state mental hospital. 1968 Op. Att'y Gen. No. 68-136.

### RESEARCH REFERENCES

**C.J.S.** — 73 C.J.S., Public Administrative Law and Procedure, §§ 87-91, 103, 108, 109, 111-114.

### 42-2-12. Reasonableness of rules and regulations.

All rules and regulations enacted by the board under the authority of this chapter must be reasonable. (Ga. L. 1956, p. 161, § 12.)

### JUDICIAL DECISIONS

**Cited in** *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967); *Wilkes County v. Arrendale*, 227 Ga. 289, 180 S.E.2d 548

(1971); *Brown v. Caldwell*, 231 Ga. 795, 204 S.E.2d 137 (1974); *Jones v. Townsend*, 267 Ga. 489, 480 S.E.2d 24 (1997).

## RESEARCH REFERENCES

**C.J.S.** — 73 C.J.S., Public Administrative Law and Procedure, § 92 et seq.

**ALR.** — Censorship of convicted prisoners' "legal" mail, 47 ALR3d 1150.

Censorship of convicted prisoners' "non-

legal" mail, 47 ALR3d 1192.

Validity and construction of prison regulation of inmates' possession of personal property, 66 ALR4th 800.

### **42-2-13. Grants to municipal corporations and counties for local jails and correctional institutions.**

(a) The commissioner may make grants of funds to municipal corporations and counties for establishing, constructing, and operating local jails and correctional institutions. Any such grant shall be in addition to, and not in lieu of, state payments made pursuant to Code Section 42-5-51 and Code Section 42-5-53. The commissioner shall make such grants where the recipient, sum, and purpose have been specified by appropriation. From funds generally available for such grants, but when such funds are available without specification other than general purpose, the commissioner shall allocate such funds according to criteria established by the commissioner, including, but not limited to, overpopulation, innovativeness, efficiency, multigovernment involvement, and readiness.

(b) Pursuant to Article VII, Section III, Paragraph III of the Constitution and as otherwise may be authorized, all grants similar to grants provided for in subsection (a) of this Code section made by the department before March 15, 1988, are ratified, confirmed, and approved. (Code 1981, § 42-2-13, enacted by Ga. L. 1988, p. 256, § 1; Ga. L. 1989, p. 14, § 42; Ga. L. 1990, p. 8, § 42.)

### **42-2-14. Power of Governor to declare state of emergency with regard to jail and prison overcrowding.**

The Governor, upon certification by the commissioner of corrections and approval by the director of the Office of Planning and Budget that the population of the prison system of the State of Georgia has exceeded the capacity of the prison system for any period of 90 consecutive days, beginning at any time after December 31, 1988, may declare a state of emergency with regard to jail and prison overcrowding. Following the declaration of such emergency, the department may establish additional facilities for use by the department, such facilities to be either of a permanent type of construction or of a temporary or movable type as the department may find most advantageous to the particular needs, to the end that the inmates under its supervision may be so distributed throughout the state as to facilitate individualization of treatment designed to prepare them for lawful living in the community where they are most likely to reside after their release from a correctional facility. For this purpose, the department

may purchase or lease sites and suitable lands and erect necessary buildings thereon or purchase or lease existing facilities, all within the limits of appropriations as approved by the General Assembly. With the approval of the Governor, provisions, other than bonding requirements, of Chapter 3 of this title, known as the "Georgia Building Authority (Penal) Act," provisions of Chapter 5 of Title 50, relating to the Department of Administrative Services, or provisions of Code Section 50-6-25 or Chapter 22 of Title 50, relating to control over acquisition of professional services, may be waived by the department to facilitate the rapid construction or procurement of facilities for inmates; provided, however, that the authority to waive provisions of Code Section 50-6-25 shall terminate as of July 1, 1991. During any year in which correctional facilities are constructed or procured under this Code section and any requirements are waived, the department shall furnish the Governor and the General Assembly with a detailed report specifying the facilities constructed or procured, the requirements waived, and the reasons therefor. (Code 1981, § 42-2-14, enacted by Ga. L. 1989, p. 57, § 1; Ga. L. 1990, p. 135, § 1.)

**Law reviews.** — For note on 1989 enactment of this Code section, see 6 Ga. St. U.L. Rev. 287 (1989).



## CHAPTER 3

## GEORGIA BUILDING AUTHORITY (PENAL)

Sec.		Sec.	
42-3-1.	Short title.	42-3-17.	Trustee of bond proceeds.
42-3-2.	Definitions.	42-3-18.	Pledge and allocation of funds to payment of bonds generally; sinking fund.
42-3-3.	Creation of authority; composition; officers; quorum; compensation of members; corporate powers of authority generally.	42-3-19.	Private enforcement of rights.
42-3-4.	Assignment of authority to Department of Administrative Services for administrative purposes.	42-3-20.	Revenue refunding bonds.
42-3-5.	Powers of authority generally.	42-3-21.	Bonds as legal investments; use of bonds as security for deposits.
42-3-6.	Authority to issue revenue bonds; general terms.	42-3-22.	Exemption of authority and bonds from taxation.
42-3-7.	Form, denomination, and place of payment of bonds; registration.	42-3-23.	Confirmation and validation of bonds.
42-3-8.	Execution of bonds.	42-3-24.	Protection of interests and rights of bondholders; chapter deemed contract with bondholders.
42-3-9.	Negotiability of bonds; exemption from taxation.	42-3-25.	Acceptance of grants and contributions by authority.
42-3-10.	Sale of bonds; advice and assistance by Georgia Building Authority.	42-3-26.	Moneys received deemed trust funds.
42-3-11.	Use of proceeds of revenue bonds; issuance of additional bonds to cover costs of projects; disposition of surplus proceeds.	42-3-27.	Establishment of rentals and charges for use of projects; costs deemed obligations of state; enforcement of performances, covenants, or obligations; assignment of rentals.
42-3-12.	Issuance of interim receipts or certificates or temporary bonds.	42-3-28.	Promulgation of rules and regulations for operation of projects.
42-3-13.	Replacement of lost, mutilated, or destroyed bonds.	42-3-29.	Maintenance of separate and distinct accounts of authority; audit of accounts.
42-3-14.	Conditions precedent to issuance of bonds; bond issuance resolution.	42-3-30.	Venue and jurisdiction of actions under chapter.
42-3-15.	Bonds not deemed to obligate state; recital on bonds; use of funds for lease contracts.	42-3-31.	Powers conferred by chapter deemed supplemental.
42-3-16.	Securing of bonds by trust indenture; trust indenture provisions.	42-3-32.	Liberal construction of chapter.

**42-3-1. Short title.**

This chapter shall be known and may be cited as the "Georgia Building Authority (Penal) Act." (Ga. L. 1960, p. 892, § 1; Ga. L. 1967, p. 864, § 1.)

**42-3-2. Definitions.**

As used in this chapter, the term:

(1) "Authority" means the Georgia Building Authority (Penal), the same being formerly known as the State Penal and Rehabilitation

Authority. All references in this chapter to "authority" shall be construed to mean the Georgia Building Authority (Penal) and the change in name of the authority shall in no way affect the identity of the authority or the rights, powers, privileges, or liabilities of the authority or any person under this chapter.

(2) "Bonds" or "revenue bonds" means any bonds issued by the authority under this chapter, including refunding bonds.

(3) "Cost of the project" means the cost of construction; the cost of all lands, properties, rights, easements, and franchises acquired; the cost of all machinery and equipment, financing charges, and interest prior to and during construction and for one year after completion of construction; the cost of engineering, architectural, and legal expenses and of plans and specifications and other expenses necessary or incident to determining the feasibility or practicability of the project; administrative expenses; and such other expenses as may be necessary or incident to the financing authorized in this chapter, the construction of any project, the placing of the same in operation, and the condemnation of property necessary for the construction and operation. Any obligation or expense incurred for any of the foregoing purposes shall be regarded as a part of the cost of the project and may be paid or reimbursed as such out of the proceeds of revenue bonds issued under this chapter for the project.

(4) "Project" means and includes one or a combination of two or more of the following:

- (A) Penal institutions;
- (B) Penitentiaries;
- (C) Prisons and prison institutions;
- (D) Detention and corrections institutions;
- (E) Rehabilitation institutions and facilities;
- (F) County correctional institutions;

(G) Facilities for adult and juvenile inmates and offenders and for the employees of any department, institution, or agency of the state having jurisdiction over state operated institutions where inmates are confined, including housing accommodations, buildings, and facilities intended for use as: prisons; training schools; classrooms; laboratories; medical facilities; dormitory facilities; instructional facilities; industrial, mechanical, vocational, and agricultural training facilities; and recreational and administrative facilities;

(H) All other structures and electric, gas, steam, and water utilities and facilities which are deemed by the authority as necessary and convenient for the operation of any department, institution, or agency conducting and operating state penal facilities.

(5) "Self-liquidating" means, in the judgment of the authority, that the revenues, rents, or earnings to be derived by the authority from any project or combination of projects will be sufficient to pay the cost of maintaining, repairing, and operating the project and to pay the principal and interest of revenue bonds which may be issued for the cost of the project, projects, or combination of projects.

(6) "Unit" means any penal institution, state or county correctional institution, training school, rehabilitation school, or other penal or rehabilitation facility at any particular location, which unit forms a part of the penal, correctional, and rehabilitation facilities of the state. (Ga. L. 1960, p. 892, § 3; Ga. L. 1964, p. 91, § 1; Ga. L. 1967, p. 864, § 3.)

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**Penitentiary defined.** — "Penitentiary" the authority of any law of this state. 1968  
means any place where felony prisoners ex- Op. Att'y Gen. No. 68-352.  
clusively are confined at hard labor under

#### **42-3-3. Creation of authority; composition; officers; quorum; compensation of members; corporate powers of authority generally.**

(a) There is created a body corporate and politic, to be known as the Georgia Building Authority (Penal), which shall be deemed to be an instrumentality of this state and a public corporation. By such name, style, and title the body may contract and be contracted with, bring and defend actions, implead and be impleaded, and complain and defend in all courts.

(b) The authority shall consist of five members, who shall be the Governor, the state auditor, the Lieutenant Governor, the Commissioner of Agriculture, and an appointee of the Governor who is not the Attorney General. The authority shall elect one of its members as chairman and another as vice-chairman, and it shall also elect a secretary and a treasurer who need not necessarily be members of the authority. Three members of the authority shall constitute a quorum. No vacancy on the authority shall impair the right of the quorum to exercise all rights and perform all the duties of the authority. The members of the authority shall be entitled to and shall be reimbursed for their actual expenses necessarily incurred in the performance of their duties.

(c) The authority shall make rules and regulations for its own government. It shall have perpetual existence. Any change in name or composition of the authority shall in no way affect the vested rights of any person under this chapter or impair the obligations of any contracts existing under this chapter. (Ga. L. 1960, p. 892, § 2; Ga. L. 1967, p. 864, § 2; Ga. L. 1985, p. 149, § 42; Ga. L. 1988, p. 426, § 1.)



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 63A Am. Jur. 2d, Public Officers and Employers, § 460 et seq.

**C.J.S.** — 67 C.J.S., Officers, §§ 219, 223, 235.

**42-3-4. Assignment of authority to Department of Administrative Services for administrative purposes.**

The authority is assigned to the Department of Administrative Services for administrative purposes only as prescribed in Code Section 50-4-3. (Ga. L. 1972, p. 1015, § 419.)

**42-3-5. Powers of authority generally.**

The authority shall have the power:

- (1) To have a seal and alter the same at pleasure;
- (2) To acquire by purchase, lease, or otherwise and to hold, lease, and dispose of real and personal property of every kind and character for its corporate purposes;
- (3) To acquire in its own name real property or rights of easement therein or franchises necessary or convenient for its corporate purposes by purchase, on such terms and conditions and in such manner as it may deem proper, or by condemnation in accordance with any and all laws applicable to the condemnation of property for public use; to use the property so long as its corporate existence shall continue and to lease or make contracts with respect to the use of or to dispose of the property in any manner it deems to the best advantage of the authority, the authority being under no obligation to accept and pay for any property condemned under this chapter, except from the funds provided under the authority of this chapter. In any proceedings to condemn, such orders as may be just to the authority and to the owners of the property to be condemned may be made by the court having jurisdiction of the proceedings. No property upon which any lien or other encumbrance exists shall be acquired under this chapter unless, at the time the property is so acquired, a sufficient sum of money is deposited in trust to pay and redeem the fair value of the lien or encumbrance. If the authority deems it expedient to construct any project on lands which are a part of the campus, grounds, or any other real estate holdings of a unit of the penal, correctional, or rehabilitation facilities of the state, the Governor is authorized to execute, for and on behalf of the state, a lease to the authority upon the lands for such parcel or parcels as shall be needed for a period not to exceed 50 years. If the authority deems it expedient to construct any project on any other lands, the title to which is then in the state, the Governor is authorized to convey, for and on behalf of the state, title to the lands for the authority as part of the consideration for the construction and financing of the project by the authority;

(4) To appoint and select officers, agents, and employees, including engineering, architectural, and construction experts, fiscal agents, and attorneys, and to fix their compensation;

(5) To make contracts and leases and to execute all instruments necessary or convenient, including contracts for the construction of projects and leases of projects or contracts with respect to the use of projects which it causes to be erected or acquired. Any and all political subdivisions, departments, institutions, or agencies of the state are authorized to enter into contracts, leases, or agreements with the authority upon such terms and for such purposes as they deem advisable. Without limiting the generality of the above, authority is specifically granted to the Department of Corrections, for and on behalf of the units and institutions under its control, and to the authority to enter into contracts and lease agreements for the use of any structure, building, or facilities of the authority for a term not exceeding 50 years. The Department of Corrections, for and on behalf of any unit or institution or combination of units or institutions, may obligate itself to pay an agreed sum for the use of the property so leased and may also obligate itself, as part of the lease contract, to pay the cost of maintaining, repairing, and operating the property so leased from the authority;

(6) To construct, erect, acquire, own, repair, remodel, maintain, add to, extend, improve, equip, operate, and manage projects, as defined in paragraph (4) of Code Section 42-3-2, to be located on property owned by or leased by the authority, the cost of any such project to be paid in whole or in part from the proceeds of revenue bonds of the authority or from such proceeds and any grant from the United States government or any agency or instrumentality thereof;

(7) To accept loans or grants of money or materials or property of any kind from the United States government or any agency or instrumentality thereof, upon such terms and conditions as the United States government or the agency or instrumentality may impose;

(8) To borrow money for any of its corporate purposes and to issue negotiable bonds payable solely from funds pledged for that purpose and to provide for the payment of the same and for the rights of the holders thereof;

(9) To exercise any power usually possessed by private corporations performing similar functions which is not in conflict with the Constitution and laws of this state; and

(10) To do all things necessary or convenient to carry out the powers expressly given in this chapter. (Ga. L. 1960, p. 892, § 4; Ga. L. 1982, p. 3, § 42; Ga. L. 1985, p. 283, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 64 Am. Jur. 2d, Public Securities and Obligations, § 46. rehabilitation of criminals, delinquents, or alcoholics as enjoined nuisance, 21 ALR3d 1058.

**ALR.** — Institution for the punishment or

**42-3-6. Authority to issue revenue bonds; general terms.**

The authority, or any authority or body which has or which may in the future succeed to the powers, duties, and liabilities vested in the authority created by this chapter, shall have the power and is authorized to provide by resolution for the issuance of negotiable revenue bonds in a sum not to exceed \$100 million for the purpose of paying all or any part of the cost, as defined in paragraph (3) of Code Section 42-3-2, of any one or combination of projects. Once a total of \$100 million in revenue bonds has been issued, no revenue bonds shall be issued thereafter. The principal and interest of the revenue bonds shall be payable solely from the special fund provided for in this chapter for such payment. The bonds of each issue shall be dated, shall bear interest at such rate or rates payable semiannually, shall mature at such time or times not exceeding 30 years from their date or dates, and shall be payable in such medium of payment as to both principal and interest as may be determined by the authority. They may be made redeemable before maturity, at the option of the authority, at such price or prices and under such terms and conditions as may be fixed by the authority in the resolution providing for the issuance of the bonds. (Ga. L. 1960, p. 892, § 5; Ga. L. 1965, p. 591, § 1; Ga. L. 1967, p. 810, § 1; Ga. L. 1970, p. 552, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 1989, p. 415, § 1.)

**Cross references.** — Revenue bonds generally, § 36-82-60 et seq.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 64 Am. Jur. 2d, Public Securities and Obligations, §§ 46, 56, 57, 63, 94-99, 104, 105, 416, 417.

**42-3-7. Form, denomination, and place of payment of bonds; registration.**

The authority shall determine the form of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest thereof, which may be at any bank or trust company within or outside the state. The bonds may be issued in coupon or registered form or both, as the authority may determine, and provision may be made for the registration of any coupon bond as to principal alone and also as to both principal and interest. (Ga. L. 1960, p. 892, § 6.)



**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 64 Am. Jur. 2d, Public Securities and Obligations, §§ 193-195, 197, 202, 426.

**42-3-8. Execution of bonds.**

In case any officer whose signature shall appear on any bonds or whose facsimile signature shall appear on any coupon shall cease to be an officer before the delivery of the bonds, the signature shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until delivery. All bonds shall be signed by the chairman of the authority, and the official seal of the authority shall be affixed thereto and attested by the secretary of the authority. Any coupons attached thereto shall bear the signature or facsimile signature of the chairman of the authority. Any coupon may bear the facsimile signature of such person and any bond may be signed, sealed, and attested on behalf of the authority by such persons as at the actual time of the execution of the bonds shall be duly authorized or hold the proper office, although at the date of the bonds the persons may not have been so authorized or shall not have held such office. (Ga. L. 1960, p. 892, § 7.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 64 Am. Jur. 2d, Public Securities and Obligations, §§ 187-192.

**42-3-9. Negotiability of bonds; exemption from taxation.**

All revenue bonds issued under this chapter shall have and are declared to have all the qualities and incidents of negotiable instruments under the law of this state. The bonds and the income thereof shall be exempt from all taxation within this state. (Ga. L. 1960, p. 892, § 8.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 64 Am. Jur. 2d, Public Securities and Obligations, §§ 270, 271. subdivision as subject of taxation or exemption, 44 ALR 510.  
**ALR.** — Bond or warrant of governmental

**42-3-10. Sale of bonds; advice and assistance by Georgia Building Authority.**

The authority may sell its bonds in such manner and for such price as it may determine to be for the best interests of the authority. Whenever the authority determines to issue its bonds, it shall call upon the Georgia Building Authority to render advice and to perform, as its agent, ministerial

services in connection with the marketing of the bonds. (Ga. L. 1960, p. 892, § 9; Ga. L. 1967, p. 864, § 4.)

**Cross references.** — Georgia Building Authority, Ch. 9, T. 50.

**42-3-11. Use of proceeds of revenue bonds; issuance of additional bonds to cover costs of projects; disposition of surplus proceeds.**

The proceeds of the bonds shall be used solely for the payment of the cost of the project or combined projects and shall be disbursed upon requisition or order of the chairman of the authority under such restrictions, if any, as the resolution authorizing the issuing of the bonds or the trust indenture mentioned in this chapter may provide. If the proceeds of the bonds, by error of calculation or otherwise, are less than the cost of the project or combined projects, unless otherwise provided in the resolution authorizing the issuance of the bonds or in the trust indenture, additional bonds may in like manner be issued to provide the amount of the deficit, which additional bonds, unless otherwise provided in the resolution authorizing the issuance of the bonds or in the trust indenture, shall be deemed to be of the same issue and shall be entitled to payment from the same fund without preference or priority of the bonds first issued for the same purpose. If the proceeds of the bonds of any issue exceed the amount required for the purpose for which the bonds are issued, the surplus shall be paid into the fund provided for in this chapter for the payment of principal and interest of the bonds. (Ga. L. 1960, p. 892, § 10.)

**42-3-12. Issuance of interim receipts or certificates or temporary bonds.**

Prior to the preparation of definitive bonds, the authority may, under like restrictions, issue interim receipts, interim certificates, or temporary bonds, with or without coupons exchangeable for definitive bonds upon the issuance of the latter. (Ga. L. 1960, p. 892, § 11.)

**42-3-13. Replacement of lost, mutilated, or destroyed bonds.**

The authority may provide for the replacement of any bond which becomes mutilated or is destroyed or lost. (Ga. L. 1960, p. 892, § 12.)

**42-3-14. Conditions precedent to issuance of bonds; bond issuance resolution.**

Revenue bonds may be issued without any proceedings or the happening of any conditions or things other than those proceedings, conditions, and things which are specified or required by this chapter. In the discretion of the authority, revenue bonds of a single issue may be issued for the purpose

of paying the cost of any one or more or a combination of projects at any one institution or any number of institutions. Any resolution providing for the issuance of revenue bonds under this chapter shall become effective immediately upon its passage and need not be published or posted; and any such resolution may be passed at any regular, special, or adjourned meeting of the authority by a majority of its members. (Ga. L. 1960, p. 892, § 13.)

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**Action by legislature.** — No action on part of legislature is contemplated or required as condition precedent to issuing bonds for authority purposes. 1963-65 Op. Att'y Gen. p. 380.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 64 Am. Jur. 2d, Public Securities and Obligations, §§ 94-99, 104, 105, 206.

#### **42-3-15. Bonds not deemed to obligate state; recital on bonds; use of funds for lease contracts.**

Revenue bonds issued under this chapter shall not be deemed to constitute a debt of this state or a pledge of the faith and credit of the state. The bonds shall be payable solely from the fund provided for in this chapter; and the issuance of the revenue bonds shall not directly, indirectly, or contingently obligate the state to levy or to pledge any form of taxation whatever therefor or to make any appropriation for the payment thereof. All such bonds shall contain recitals on their face covering substantially the foregoing provisions of this Code section; provided, however, that such funds as may be received from state appropriations or from any other source are declared to be available and may be used by the Department of Corrections for the performance of any lease contract entered into by the department. (Ga. L. 1960, p. 892, § 14; Ga. L. 1985, p. 283, § 1.)

#### **42-3-16. Securing of bonds by trust indenture; trust indenture provisions.**

In the discretion of the authority, any issue of revenue bonds may be secured by a trust indenture by and between the authority and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or outside of the state. The trust indenture may pledge or assign rents, revenues, and earnings to be received by the authority. Either the resolution providing for the issuance of revenue bonds or the trust indenture may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the authority in relation to the acquisition of property; the construction of the project; the maintenance, operation, repair, and



insurance of the project; and the custody, safeguarding, and application of all moneys. The resolution or trust indenture may also (1) provide that any project shall be constructed and paid for under the supervision and approval of consulting engineers or architects employed or designated by the authority and satisfactory to the original purchasers of the bonds issued therefor, (2) require that the security given by contractors and by any depository of the proceeds of the bonds or revenues or other moneys be satisfactory to such purchasers, and (3) contain provisions concerning the conditions, if any, upon which additional revenue bonds may be issued. It shall be lawful for any bank or trust company incorporated under the laws of this state to act as such depository and to furnish such indemnifying bonds or to pledge such securities as may be required by the authority. The trust indenture may set forth the rights and remedies of the bondholders and of the trustee and may restrict the individual right of action of bondholders as is customary in trust indentures securing bonds and debentures of corporations. In addition to the foregoing, the trust indenture may contain such other provisions as the authority may deem reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the trust indenture may be treated as a part of the cost of maintenance, operation, and repair of the project affected by the trust indenture. (Ga. L. 1960, p. 892, § 15.)

#### **42-3-17. Trustee of bond proceeds.**

In the resolution providing for the issuance of revenue bonds or in the trust indenture, the authority shall provide for the payment of the proceeds of the sale of the bonds to any officer or person who, or to any agency, bank, or trust company which, shall act as trustee of such funds and shall hold and apply the same to the purposes of this chapter, subject to such regulations as this chapter and the resolution or trust indenture may provide. (Ga. L. 1960, p. 892, § 16; Ga. L. 1982, p. 3, § 42.)

#### **42-3-18. Pledge and allocation of funds to payment of bonds generally; sinking fund.**

(a) The following funds may be pledged and allocated by the authority to the payment of the principal and interest on revenue bonds of the authority, as the resolution authorizing the issuance of the bonds or the trust instrument may provide:

(1) The revenues, rents, and earnings derived from any particular project or combination of projects;

(2) Any and all funds received by the Department of Corrections from any source and pledged and allocated by the department to the authority as security for the performance of any lease or leases; and

(3) Any and all revenues, rents, and earnings received by the authority, regardless of whether or not the rents, earnings, and revenues were

produced by a particular project for which bonds have been issued, unless otherwise pledged and allocated.

(b) The funds pledged, from whatever source received, including funds received from one or more or all of the sources referred to in subsection (a) of this Code section, shall be set aside at regular intervals, as may be provided in the resolution or trust indenture, into a sinking fund. The sinking fund shall be pledged to and charged with the payment of:

(1) The interest upon revenue bonds of the authority as interest shall fall due;

(2) The principal of the bonds as the same shall fall due;

(3) The necessary charges of paying agents for paying principal and interest; and

(4) Any premium upon bonds retired by call or purchase, as provided in this chapter.

(c) The use and disposition of the sinking fund shall be subject to such regulations as may be provided in the resolution authorizing the issuance of the revenue bonds or in the trust indenture, but, except as may otherwise be provided in the resolution or trust indenture, the sinking fund shall be a fund for the benefit of all revenue bonds without distinction or priority of one over another. Subject to the resolution authorizing the issuance of the bonds or the trust indenture, surplus moneys in the sinking fund may be applied to the purchase or redemption of bonds; and any such bonds purchased or redeemed shall be canceled and shall not again be issued. (Ga. L. 1960, p. 892, § 17; Ga. L. 1985, p. 283, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 64 Am. Jur. 2d, Public Securities and Obligations, § 425.

**ALR.** — Constitutional provisions against impairment of obligations of contract as

applied to sinking funds for retirement of municipal or other public bonds, 115 ALR 220.

#### 42-3-19. Private enforcement of rights.

Any holder of revenue bonds or interest coupons issued under this chapter, any receiver for such holders, or any indenture trustee, except to the extent the rights given in this Code section may be restricted by resolution passed before the issuance of the bonds or by the trust indenture, by action, mandamus, or other proceedings, may protect and enforce any and all rights under the laws of this state or granted under this chapter or under the resolution or trust indenture and may enforce and compel performance of all duties required by this chapter or by resolution or trust indenture to be performed by the authority or any officer thereof, including the fixing, charging, and collecting of revenues, rents, and other

charges for the use of the project or projects. In the event of default of the authority upon the principal and interest obligations of any revenue bond issue, such bondholder, receiver, or indenture trustee shall be subrogated to each and every right, specifically including the contract rights of collecting rental, which the authority may possess against the Department of Corrections or other contracting or leasing department, agency, or institution of the state and in the pursuit of its remedies as subrogee, may proceed by action, mandamus, or other proceedings to collect any sums due and owing to the authority and pledged or partially pledged directly or indirectly to the benefit of the revenue bond issue of which the bondholder, receiver, or trustee is representative. No holder of any bond of the authority or receiver or indenture trustee thereof shall have the right to compel any exercise of the taxing power of the state to pay any bond or the interest thereon or to enforce the payment thereof against any property of the state; nor shall any bond of the authority constitute a charge, lien, or encumbrance, legal or equitable, upon the property of the state; provided, however, that any provision of this or any other chapter to the contrary notwithstanding, any such bondholder or receiver or indenture trustee shall have the right by appropriate legal or equitable proceedings including, without being limited to, mandamus to enforce compliance by the appropriate public officials with Article VII, Section IV of the Constitution of this state; and permission is given for the institution of any such proceedings to compel the payment of lease obligations. (Ga. L. 1960, p. 892, § 18; Ga. L. 1964, p. 91, § 2; Ga. L. 1982, p. 3, § 42; Ga. L. 1983, p. 3, § 60; Ga. L. 1985, p. 283, § 1.)

#### RESEARCH REFERENCES

Am. Jur. 2d. — 64 Am. Jur. 2d, Public Securities and Obligations, §§ 261-263, 266-269, 276, 403 et seq.

#### 42-3-20. Revenue refunding bonds.

The authority is authorized to provide by resolution for the issuance of revenue refunding bonds of the authority for the purpose of refunding any revenue bonds issued under this chapter and then outstanding, together with accrued interest thereon. The issuance of revenue refunding bonds, the maturities and all other details thereof, the rights of the holders thereof, and the duties of the authority in respect to the same shall be governed by this chapter, insofar as the same may be applicable. (Ga. L. 1960, p. 892, § 19.)

#### 42-3-21. Bonds as legal investments; use of bonds as security for deposits.

The bonds authorized in this chapter are made securities in which (1) all public officers and bodies of this state, (2) all municipalities and all municipal subdivisions, (3) all insurance companies and associations and



other persons carrying on an insurance business, (4) all banks, bankers, trust companies, savings banks, and savings associations, including savings and loan associations, building and loan associations, investment companies, and other persons carrying on a banking business, (5) all administrators, guardians, executors, trustees, and other fiduciaries, and (6) all other persons whatsoever who may invest in bonds or other obligations of the state may properly and legally invest funds, including capital in their control or belonging to them. The bonds are also made securities which may be deposited with and shall be received by all public officers and bodies of this state and all municipalities and municipal subdivisions for any purpose for which the deposit of the bonds or other obligations of this state is authorized. (Ga. L. 1960, p. 892, § 20.)

#### **42-3-22. Exemption of authority and bonds from taxation.**

It is found, determined, and declared that the creation of the authority and the carrying out of its corporate purpose is in all respects for the benefit of the people of this state and is a public purpose and that the authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this chapter. This state covenants with the holders of the bonds issued under this chapter that the authority shall be required to pay no taxes or assessments upon any of the property acquired or leased by it or under its jurisdiction, control, possession, or supervision; upon its activities in the operation or maintenance of the buildings erected or acquired by it; upon any fees, rentals, or other charges for the use of such buildings; or upon other income received by the authority. This state further covenants that the bonds of the authority, their transfer, and the income therefrom shall at all times be exempt from taxation within the state. (Ga. L. 1960, p. 892, § 21; Ga. L. 1982, p. 3, § 42.)

#### **42-3-23. Confirmation and validation of bonds.**

Bonds of the authority shall be confirmed and validated in accordance with the procedure of Article 3 of Chapter 82 of Title 36. The petition for validation shall also make any authority, subdivision, instrumentality, or agency of this state which has contracted with the authority for the use of any building, structure, or facilities for which bonds have been issued and sought to be validated a party defendant to the action. Such authority, subdivision, instrumentality, or agency shall be required to show cause, if any, why the contract or contracts and the terms and conditions thereof should not be inquired into by the court, the validity of the terms thereof determined, and the contract adjudicated as security for the payment of any bonds of the authority. The bonds, when validated, and the judgment of validation shall be final and conclusive with respect to the bonds and against the authority issuing the same, as well as against any authority, subdivision,

instrumentality, or agency contracting with the authority. (Ga. L. 1960, p. 892, § 23.)

**42-3-24. Protection of interests and rights of bondholders; chapter deemed contract with bondholders.**

While any of the bonds issued by the authority remain outstanding, the powers, duties, or existence of the authority or of its officers, employees, or agents or of the Department of Corrections or of any other state agency or department shall not be diminished or impaired in any manner that will affect adversely the interests and rights of the holders of the bonds; and no other entity, department, agency, or authority will be created which will compete with the authority to such an extent as to affect adversely the interests and rights of the holders of the bonds, nor will the state itself so compete with the authority. This chapter shall be for the benefit of the state, the authority, and the holders of any such bonds and, upon the issuance of bonds under this chapter, shall constitute a contract with the holders of the bonds. (Ga. L. 1960, p. 892, § 24; Ga. L. 1985, p. 283, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 64 Am. Jur. 2d, Public Securities and Obligations, § 403.

**42-3-25. Acceptance of grants and contributions by authority.**

In addition to the moneys which may be received from the sale of revenue bonds and from the collection of revenues, rents, and earnings derived under this chapter, the authority shall have authority to accept from any federal agency grants for or in aid of the construction of any projects or for the payment of bonds and to receive and accept from any source contributions of money or property or other things of value to be held, used, and applied only for the purposes for which the grants or contributions may be made. (Ga. L. 1960, p. 892, § 25.)

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**Acceptance and use of contributions.** — The Georgia Building Authority (Penal) may accept and receive contributions from any source, and use such contributions to pay the salary of the commissioner of corrections for services rendered. 1971 Op. Att'y Gen. No. 71-101.

**42-3-26. Moneys received deemed trust funds.**

All moneys received pursuant to the authority of this chapter, whether as proceeds from the sale of revenue bonds, as grants or other contributions, or as revenues, rents, and earnings, shall be deemed to be trust funds to be

held and applied solely as provided in this chapter. (Ga. L. 1960, p. 892, § 26.)

**42-3-27. Establishment of rentals and charges for use of projects; costs deemed obligations of state; enforcement of performances, covenants, or obligations; assignment of rentals.**

(a) The authority is authorized to fix rentals and other charges which the Department of Corrections shall pay to the authority for the use of each project or part thereof or combination of projects, to charge and collect the same, and to lease and make contracts with political subdivisions, agencies, and with the Department of Corrections with respect to the use by any institution or unit under its control of any project or part thereof. The rentals and other charges shall be fixed and adjusted in respect to the aggregate thereof from the project or projects for which a single issue of revenue bonds is issued so as to provide a fund sufficient with other revenues of the project or projects, if any, to pay:

(1) The cost of maintaining, repairing, and operating the project or projects, including reserves for extraordinary repairs and insurance and other reserves required by the resolution or trust indentures, unless the cost is otherwise provided for, which cost shall be deemed to include the expenses incurred by the authority on account of the project or projects for water, light, sewer, and other services furnished by other facilities at such institution; and

(2) The principal of the revenue bonds and the interest thereon as the same becomes due.

(b) The rentals contracted to be paid to the authority by the Department of Corrections or other contracting or leasing department, agency, or institution of the state under leases entered upon pursuant to this chapter shall constitute obligations of the state for the payment of which the good faith of the state is pledged. The rentals shall be paid as provided in the lease contracts from funds appropriated for such purposes by the terms of the Constitution of this state. It shall be the duty of the Department of Corrections or other contracting or leasing department, agency, or institution of the state to see to the punctual payment of all such rentals.

(c) In the event of any failure or refusal on the part of lessees to perform punctually any covenant or obligation contained in any lease entered upon pursuant to this chapter, the authority may enforce performance by any legal or equitable process against lessees; and consent is given for the institution of any such action.

(d) The authority shall be permitted to assign any rental due it by the lessees to a trustee or paying agent, as may be required by the terms of any trust indenture entered into by the authority. (Ga. L. 1960, p. 892, § 27; Ga. L. 1964, p. 91, § 3; Ga. L. 1985, p. 283, § 1; Ga. L. 1991, p. 94, § 42.)



**42-3-28. Promulgation of rules and regulations for operation of projects.**

It shall be the duty of the authority to prescribe rules and regulations for the operation of each project or combination of projects constructed under this chapter, including rules and regulations to ensure maximum use or occupancy of each project. (Ga. L. 1960, p. 892, § 28.)

**42-3-29. Maintenance of separate and distinct accounts of authority; audit of accounts.**

The accounts of the authority shall be kept as separate and distinct accounts by the Department of Corrections and shall be subject to audit by the Department of Audits and Accounts. (Ga. L. 1960, p. 892, § 32; Ga. L. 1985, p. 283, § 1.)

**42-3-30. Venue and jurisdiction of actions under chapter.**

Any action to protect or enforce any rights under this chapter shall be brought in the Superior Court of Fulton County, as shall any action pertaining to validation of any bonds issued under this chapter. Such court shall have exclusive, original jurisdiction of such actions. (Ga. L. 1960, p. 892, § 22.)

**Law reviews.** — For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

**42-3-31. Powers conferred by chapter deemed supplemental.**

This chapter shall be deemed to provide an additional and alternative method for the doing of the things authorized in this chapter, shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any other powers. (Ga. L. 1960, p. 892, § 29; Ga. L. 1985, p. 149, § 42.)

**42-3-32. Liberal construction of chapter.**

This chapter, being for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes hereof. (Ga. L. 1960, p. 892, § 30.)

## JAILS

### CHAPTER 4

## JAILS

#### Article 1

##### General Provisions

- Sec.  
42-4-1. Appointment of county and municipal jailers.  
42-4-2. Oath and bond of jailers.  
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42-4-4. Duties of sheriff as to jail inmates; designation of inmate as trusty; failure to comply with Code section.  
42-4-5. Cruelty to inmates.  
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42-4-9. Conditions for receipt of federal prisoners.  
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42-4-11. Procedure for transfer of person in custody upon change of venue.  
42-4-12. Penalty for refusal by officer to receive persons charged with or guilty of offense.  
42-4-13. Possession of drugs, weapons, or alcohol by inmates.

#### Article 2

##### Conditions of Detention

- 42-4-30. Definitions.  
42-4-31. Required safety and security measures.  
42-4-32. Sanitation and health requirements generally; meals; inspections; medical treatment.  
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#### Article 3

##### Medical Services for Inmates

- 42-4-50. Definitions.

#### Sec.

42-4-51.

Information as to inmate's health insurance or eligibility for benefits; access to medical services; liability for payment; inmate's liability for costs of medical care; procedure for recovery against inmate.

#### Article 4

##### Deductions from Inmate Accounts for Expenses

- 42-4-70. Definitions.  
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#### Article 5

##### Regional Jail Authorities

- 42-4-90. Short title.  
42-4-91. Statement of authority; policy of state.  
42-4-92. Definitions.  
42-4-93. Creation of authorities; ordinance or resolution required; agreement; approval of sheriff; exemption from Georgia State Financing and Investment Commission Act.  
42-4-94. Board of directors; members; election of officers; expenses; duties; addition of counties or municipalities to authority.  
42-4-95. Management committee of county regional jail authority; management and operation of municipal regional jail authority.  
42-4-96. Quorums; voting requirements.  
42-4-97. Powers of authority.  
42-4-98. Duties and responsibilities of sheriffs and governing bodies imposed upon management committee and authority.  
42-4-99. Limitation on liability of members, officers, or employees.  
42-4-100. Bonds or other obligations; re-

Sec.		Sec.	
	quirements and procedure for issuance.	42-4-103.	Operation and finance agreement required; withdrawal from authority.
42-4-101.	Bonds or other obligations not indebtedness of state or political subdivision; payment.	42-4-104.	Authority of county or municipality to establish and maintain jail or jail-holding facility.
42-4-102.	Construction of article; bonds not subject to regulation under Georgia Securities Act; power of counties and municipalities to activate authorities.	42-4-105.	Immunity of authorities from liability.

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**Cross references.** — Standards relating to construction of county jails, § 36-9-9.

### JUDICIAL DECISIONS

**Court order that sheriff transfer prisoner to secure jail.** — While it is beyond dispute that the sheriff, and not the superior court, is charged with administration of jails, where an issue is properly raised before the trial court regarding jail security or other matters of jail administration and evidence is presented on the issue, the court is empowered to make a determination. Upon a determination that the jail is not secure, the trial court is authorized to order the sheriff to transfer a prisoner to the nearest county having a secure jail. In re Irvin, 254 Ga. 251, 328 S.E.2d 215 (1985).

### RESEARCH REFERENCES

**ALR.** — Constitutional right of prisoners to abortion services and facilities — federal cases, 90 ALR Fed. 683.

## ARTICLE 1

### GENERAL PROVISIONS

### RESEARCH REFERENCES

**ALR.** — Validity and construction of prison regulation of inmates' possession of personal property, 66 ALR4th 800.

#### 42-4-1. Appointment of county and municipal jailers.

(a) By virtue of their offices, sheriffs are jailers of the counties and have the authority to appoint other jailers, subject to the supervision of the county governing authority, as prescribed by law.

(b) By virtue of their offices, chiefs of police are the jailers of the municipal corporations and have the authority to appoint other jailers, subject to the supervision of the municipal governing authority, as pre-



scribed by law. Each jailer of a municipal corporation shall maintain the records required of sheriffs by subsection (a) of Code Section 42-4-7. (Orig. Code 1863, § 331; Code 1868, § 392; Code 1873, § 356; Code 1882, § 356; Penal Code 1895, § 1120; Penal Code 1910, § 1149; Code 1933, § 77-101; Ga. L. 1988, p. 266, § 1.)

**Cross references.** — Sheriffs generally, Ch. 16, T. 15.

### JUDICIAL DECISIONS

**Liability of sheriff for prisoner's death.** — Where a prisoner has been placed in the custody of and accepted by a sheriff through his deputy, the jailor of the county, and where the prisoner is drunk and as a result of his drunkenness sets fire to himself and is burned to death, the sheriff and the sureties on his official bond are not liable to the dependents of the deceased prisoner, upon the ground that the jailor was negligent in incarcerating him in a cell by himself without first searching him and removing from his person any object or article with which he might inflict injury upon himself or oth-

ers, such as matches, and on the ground that the jailor did not respond to the drunken cries of the prisoner for help. *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935).

**Sheriff of county has a statutory duty to accept all city prisoners** and the county commissioners have authority to require him to do so. *Griffin v. Chatham County*, 244 Ga. 628, 261 S.E.2d 570 (1979).

**Cited in** *Chappell v. Kilgore*, 196 Ga. 591, 27 S.E.2d 89 (1943); *Howington v. Wilson*, 213 Ga. 664, 100 S.E.2d 726 (1957).

### OPINIONS OF THE ATTORNEY GENERAL

**Person arrested by a campus policeman** for violation of a state criminal law should be incarcerated in the county jail, as the sheriff is, by virtue of his office, the county jailer; whether the accused is to be admitted to bail and the amount thereof are matters which are addressed to the commitment court. 1970 Op. Att'y Gen. No. 70-69.

**No surcharge payment as condition to serving sentence.** — A sheriff must accept into custody those individuals convicted of criminal offenses who have been sentenced to a term of incarceration, and the sheriff may not require payment of a surcharge as a condition precedent to service of the sentence. 1992 Op. Att'y Gen. No. U92-4.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 21, 22.

**C.J.S.** — 72 C.J.S., Prisons and Rights of

Prisoners, §§ 14-16. 80 C.J.S., Sheriffs and Constables, § 32.

### 42-4-2. Oath and bond of jailers.

Before commencing to carry out the duties of their office, jailers must give to the sheriff a bond and surety for the sum of \$1,000.00, conditioned for the faithful performance of their duties as jailers, and shall take and subscribe before the sheriff of their respective counties, to be filed in and entered into the records of the sheriff's office, the following oath:

"I do swear that I will well and truly do and perform, all and singular, the duties of jailer for the County of \_\_\_\_; and that I will humanely treat prisoners who may be brought to the jail of which I am keeper and not suffer them to escape by any negligence or inattention of mine. So help me God." (Laws 1811, Cobb's 1851 Digest, pp. 201, 202; Code 1863, § 332; Code 1868, § 393; Code 1873, § 357; Code 1882, § 357; Penal Code 1895, § 1121; Penal Code 1910, § 1150; Code 1933, § 77-102; Ga. L. 1987, p. 342, § 1.)

### JUDICIAL DECISIONS

**Duty of care sheriff owes prisoners.** — A sheriff owes to a prisoner placed in his custody a duty to keep the prisoner safely and free from harm, to render him medical aid when necessary, and to treat him humanely and refrain from oppressing him; and where a sheriff is negligent in his care and custody of a prisoner, and as a result the prisoner receives injury or meets his death, or where a sheriff fails in the performance of his duty to the prisoner, and the latter suffers injury or meets his death as a result of such failure, the sheriff would, in a proper case, be liable on his official bond to the injured prisoner or to his dependents. *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935).

**Liability of sheriff for prisoner's death.** — Where a prisoner has been placed in the custody of and accepted by a sheriff through his deputy, the jailor of the county, and where the prisoner is drunk and as a result

of his drunkenness sets fire to himself and is burned to death, the sheriff and the sureties on his official bond are not liable to the dependents of the deceased prisoner, upon the ground that the jailor was negligent in incarcerating him in a cell by himself without first searching him and removing from his person any object or article with which he might inflict injury upon himself or others, such as matches, and on the ground that the jailor did not respond to the drunken cries of the prisoner for help. *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935).

**Sheriff's duty of safe confinement.** — Custody of defendant, pending his trial under an indictment for criminal offense, is in the sheriff of the county wherein the offense was committed, and the responsibility for his safe and secure confinement in jail is that of the sheriff. *Howington v. Wilson*, 213 Ga. 664, 100 S.E.2d 726 (1957).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 179. 63A Am. Jur. 2d, Public Officers and Employees, § 487 et seq.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, § 127.

**ALR.** — Personal liability of policeman, sheriff, or similar peace officer on his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker, 41 ALR3d 700.

### 42-43. When coroner to act as keeper of jail.

The county coroner shall be keeper of the jail when the sheriff is imprisoned or absent from the county leaving no deputy. (Orig. Code 1863, § 564; Code 1868, § 628; Code 1873, § 587; Code 1882, § 587; Penal Code 1895, § 1122; Penal Code 1910, § 1151; Code 1933, § 77-105.)

**Cross references.** — Coroners generally,  
Ch. 16, T. 45.

#### RESEARCH REFERENCES

**C.J.S.** — 80 C.J.S., Sheriffs and Constables,  
§§ 32, 38.

#### **42-44. Duties of sheriff as to jail inmates; designation of inmate as trusty; failure to comply with Code section.**

(a) It shall be the duty of the sheriff:

(1) To take from the outgoing sheriff custody of the jail and the bodies of such persons as are confined therein, along with the warrant or cause of commitment;

(2) To furnish persons confined in the jail with medical aid, heat, and blankets, to be reimbursed if necessary from the county treasury, for neglect of which he shall be liable to suffer the penalty prescribed in this Code section; provided, however, that, with respect to an inmate covered under Article 3 of this chapter, the officer in charge will provide such person access to medical aid and may arrange for the person's health insurance carrier to pay the health care provider for the aid rendered; and

(3) To take all persons arrested or in execution under any criminal or civil process to the jail of an adjoining county, or to the jail of some other county if the latter is more accessible, if the jail of his county is in an unsafe condition, under such rules as are prescribed in this chapter.

(b) Subject to the provisions of this subsection and except as provided by law or as directed by a court of competent jurisdiction, a sheriff shall not release a prisoner from his custody prior to the lawful completion of his sentence including any lawful credits under a trusty system. The provision shall not, however, preclude a sheriff from designating an inmate as a trusty and utilizing him in a lawful manner and, furthermore, this provision shall not preclude a sheriff from transferring a prisoner to another jail in another county if the sheriff concludes that such transfer is in the best interest of the prisoner or that such transfer is necessary for the orderly administration of the jail.

(c) Any sheriff or deputy who fails to comply with this Code section shall be fined for contempt, as is the clerk of the superior court in similar cases. The sheriff or deputy shall also be subject to removal from office as prescribed in Code Section 15-6-82. (Laws 1799, Cobb's 1851 Digest, p. 574; Laws 1810, Cobb's 1851 Digest, p. 577; Laws 1818, Cobb's 1851 Digest, p. 858; Laws 1820, Cobb's 1851 Digest, p. 480; Laws 1823, Cobb's 1851 Digest, p. 512; Code 1863, §§ 336, 340; Ga. L. 1865-66, p. 64, § 15; Code 1868,



§§ 397, 401; Code 1873, §§ 361, 366; Code 1882, §§ 361, 366; Penal Code 1895, §§ 1127, 1128; Penal Code 1910, §§ 1156, 1157; Code 1933, §§ 77-110, 77-111; Ga. L. 1990, p. 1443, § 1; Ga. L. 1992, p. 2125, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1990, "trusty" was substituted for "trustee" in subsection (b).

**Law reviews.** — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 310 (1992).

### JUDICIAL DECISIONS

**Legislative intent.** — This section was not intended to require that the availability of health insurance was a precondition to obtaining medical treatment for an inmate or that an inmate otherwise would be expected to pay for medical treatment received. *Cherokee County v. North Cobb Surgical Assocs.*, P.C., 221 Ga. App. 496, 471 S.E.2d 561 (1996).

**Duty of care sheriff owes prisoners.** — A sheriff owes to a prisoner placed in his custody a duty to keep the prisoner safely and free from harm, to render him medical aid when necessary, and to treat him humanely and refrain from oppressing him; and where a sheriff is negligent in his care and custody of a prisoner, and as a result the prisoner receives injury or meets his death, or where a sheriff fails in the performance of his duty to the prisoner, and the latter suffers injury or meets his death as a result of such failure, the sheriff would, in a proper case, be liable on his official bond, to the injured prisoner or to his dependents. *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935).

**Removal from office.** — Under this section and § 15-6-10, the provisions of § 15-6-82, providing for the removal of clerks of the superior court from office, apply to the removal of sheriffs from office. *Adamson v. Leathers*, 60 Ga. App. 382, 3 S.E.2d 871 (1939).

Under § 15-6-82, sheriffs are subject to be removed from office for "any sufficient cause," and sufficient cause means a cause relating to and affecting the administration of the office and material to the interests of the public. *Adamson v. Leathers*, 60 Ga. App. 382, 3 S.E.2d 871 (1939).

**County's duty to use convicts for road work.** — County has statutory authority to use its quota of convicts for constructing and maintaining its system of public roads, and it may also legally use convict labor for the purpose of doing any necessary work in or about its public works camps (now county correctional institutions). *Newman v. Aldredge*, 210 Ga. 765, 82 S.E.2d 823 (1954).

**Recovery of fee by physician.** — Where a physician performs an operation on a prisoner at request of sheriff, he cannot maintain an action against the county to recover his fee. *Nolan v. Cobb County*, 141 Ga. 385, 81 S.E. 124, 50 L.R.A. (n.s.) 1223 (1914).

**Authority to transfer prisoner.** — The sheriff, and not the judge of the court, has the authority to transfer a prisoner awaiting trial to a jail in another county, and then only when the jail in the county where the prisoner is confined is "in an unsafe condition." *Howington v. Wilson*, 213 Ga. 664, 100 S.E.2d 726 (1957).

**Court transferring prisoner to another jail.** — Trial court may not, on its own motion, transfer prisoner to another jail where the court, without the issue being raised, concludes the local jail is not secure. *In re Irvin*, 254 Ga. 251, 328 S.E.2d 215 (1985).

**Cited in** *Lumpkin County v. Davis*, 185 Ga. 393, 195 S.E. 169 (1938); *Tate v. National Sur. Corp.*, 58 Ga. App. 874, 200 S.E. 314 (1938); *Moore v. Baldwin County*, 209 Ga. 541, 74 S.E.2d 449 (1953); *Cole v. Holland*, 219 Ga. 227, 132 S.E.2d 657 (1963); *Whiddon v. State*, 160 Ga. App. 777, 287 S.E.2d 114 (1982).

### OPINIONS OF THE ATTORNEY GENERAL

**Board entering contract with county to house county prisoners.** — Board of Offender Rehabilitation (Corrections) cannot enter into contract with a county to house county prisoners while county jail is being rebuilt. 1954-56 Op. Att'y Gen. p. 527.

**Expenditure of funds for parolee's medical expenses.** — The Board is not authorized to expend funds for payment of medical expenses of a parolee injured in an escape from custody of county law enforcement officials prior to revocation of parole; rather,

such is the duty of the sheriff. 1971 Op. Att'y Gen. No. 71-120.

**Sheriffs' derivative duties.** — As a natural concomitance of the duties imposed under this section and §§ 42-4-1 and 42-5-100, the sheriff would be responsible for calculating sentences of felony prisoners held in the county jail pending appeal, and would be the appropriate discharging authority should a sentence expire before a prisoner is transferred to the custody of state authorities. 1978 Op. Att'y Gen. No. U78-46.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 21-23.

**C.J.S.** — 18 C.J.S., Convicts, §§ 10, 12. 72 C.J.S., Prisons and Rights of Prisoners, §§ 16, 63 et seq., 80 et seq., §§ 124-126. 80 C.J.S., Sheriffs and Constables, §§ 117, 216(a), 216(b), 217-219, 231.

**ALR.** — Personal liability of policeman, sheriff, or similar peace officer or his bond,

for injury suffered as a result of failure to enforce law or arrest lawbreaker, 41 ALR3d 700.

Liability of prison authorities for injury to prisoner directly caused by assault by other prisoner, 41 ALR3d 1021.

Civil liability of prison or jail authorities for self-inflicted injury or death of prisoner, 79 ALR3d 1210.

### 42-4-5. Cruelty to inmates.

(a) No jailer, by duress or other cruel treatment, shall make or induce an inmate to accuse or give evidence against another; nor shall he be guilty of willful inhumanity or oppression to any inmate under his care and custody.

(b) Any jailer who violates subsection (a) of this Code section shall be punished by removal from office and imprisonment for not less than one year nor longer than three years. (Cobb's 1851 Digest, p. 805; Code 1863, § 4367; Code 1868, § 4405; Code 1873, § 4473; Code 1882, § 4473; Penal Code 1895, § 282; Penal Code 1910, § 286; Code 1933, §§ 77-104, 77-9901.)

**Cross references.** — Prohibition against cruel and unusual punishment, U.S. Const.,

Amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII.

### JUDICIAL DECISIONS

**Duty of care sheriff owes prisoners.** — A sheriff owes to a prisoner placed in his custody a duty to keep the prisoner safely and free from harm, to render him medical aid when necessary, and to treat him humanely and refrain from oppressing him; and where a sheriff is negligent in his care

and custody of a prisoner and as a result the prisoner receives injury or meets his death, or where a sheriff fails in the performance of his duty to the prisoner and the latter suffers injury or meets his death as a result of such failure, the sheriff would, in a proper case, be liable on his official bond, to the injured

prisoner or to his dependents. *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935).

**Liability of sheriff for prisoner's death.** — Where a prisoner has been placed in the custody of and accepted by a sheriff through his deputy, the jailor of the county, and where the prisoner is drunk and as a result of his drunkenness sets fire to himself and is burned to death, the sheriff and the sureties on his official bond are not liable to the dependents of the deceased prisoner, upon the ground that the jailor was negligent in

incarcerating him in a cell by himself without first searching him and removing from his person any object or article with which he might inflict injury upon himself or others, such as matches, and on the ground that the jailor did not respond to the drunken cries of the prisoner for help. *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935).

**Cited in** *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967); *Jackson v. Zant*, 210 Ga. App. 581, 436 S.E.2d 771 (1993).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 21-23, 174, 196, 197.

**ALR.** — Liability for death or injury to prisoner, 61 ALR 569.

Liability of prison authorities for injury to

prisoner directly caused by assault by other prisoner, 41 ALR3d 1021.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 ALR3d 678.

### 42-4-6. Confinement and care of tubercular inmates; crediting of time spent in hospital or institution against sentence.

(a) When any person confined in the common jail who is awaiting trial for any offense against the penal laws of this state or who has been convicted of an offense or who is serving any jail sentence imposed upon him by authority or who has been committed for any civil or criminal contempt or who is serving any misdemeanor sentence under county jurisdiction in a county correctional institution or other institution for the maintenance of county inmates is afflicted with tuberculosis, the judge of the superior court may order the person's delivery by the sheriff to an institution as may be approved and supported by the Department of Human Resources for the care of tubercular patients; thereupon, he shall be so delivered and received in such institution and shall be securely confined, kept, and cared for.

(b) The period of time a person is kept and confined in a hospital or institution pursuant to subsection (a) of this Code section shall be credited upon any jail sentence being served by him, in the same manner as though he had remained in jail. Any person committed for any civil or criminal contempt shall remain for all purposes under the orders, jurisdiction, and authority of the court committing him for contempt while in the hospital or institution, in the same manner as though he had remained in the common jail. (Ga. L. 1960, p. 769, § 2; Ga. L. 1964, p. 365, § 1; Ga. L. 1994, p. 97, § 42.)

**Cross references.** — Hospitalization of persons for tuberculosis, Ch. 14, T. 31.



## OPINIONS OF THE ATTORNEY GENERAL

**Confinement of tubercular prisoners.** — When a prisoner is found to have tuberculosis, he will be sent to a state hospital or other approved hospital, and confinement there will count toward his prison sentence. 1962 Op. Att'y Gen. p. 383.

## RESEARCH REFERENCES

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 21, 138.

**42-4-7. Maintenance of inmate record by sheriff; good-time allowances.**

(a) The sheriff shall keep a record of all persons committed to the jail of the county of which he or she is sheriff. This record shall contain the name of the person committed, such person's age, sex, race, under what process such person was committed and from what court the process issued, the crime with which the person was charged, the date of such person's commitment to jail, the day of such person's discharge, under what order such person was discharged, and the court from which the order issued. This record shall be subject to examination by any person in accordance with the provisions of Article 4 of Chapter 18 of Title 50, relating to the inspection of public records.

(b) (1) The sheriff, chief jailer, warden, or other officer designated by the county as custodian of inmates confined as county inmates for probation violations of felony offenses or as provided in subsection (a) of Code Section 17-10-3 shall award good-time allowances to such inmates based on institutional behavior. Good-time allowances shall not be awarded which exceed one-half of the period of confinement imposed.

(2) Upon receipt of an inmate sentenced to confinement as a county inmate, the custodian of such inmate shall compute the maximum good-time allowance that such inmate may earn. The custodian may make appropriate deductions from such maximum earnable good-time allowance based on the institutional behavior of such inmate while in custody as a county inmate.

(3) An inmate sentenced to confinement as a county inmate shall be released at the expiration of his or her sentence less the time deducted for good-time allowances.

(c) Commencing January 1, 1984, those provisions of subsection (b) of this Code section which provide for good-time allowances to be awarded to inmates sentenced to confinement as county inmates as provided in subsection (a) of Code Section 17-10-3 shall apply to all such inmates in confinement on December 31, 1983, and all inmates who commit crimes on or after January 1, 1984, and are subsequently convicted and sentenced to confinement as county inmates. Conversion of the computation of the

sentences of county inmates in confinement on December 31, 1983, from earned-time governed sentences to good-time governed sentences shall be made by the sheriff or other custodian of such inmates. Commencing July 1, 1994, those provisions of subsection (b) of this Code section which provide for good-time allowances to be awarded to inmates sentenced to confinement as county inmates for probation violations of felony offenses shall apply to all such inmates in confinement on June 30, 1994, and all inmates whose probation is revoked or who commit crimes on or after July 1, 1994, and are subsequently sentenced to confinement as county inmates. (Ga. L. 1877, p. 111, § 1; Code 1882, § 366a; Penal Code 1895, § 1125; Penal Code 1910, § 1154; Code 1933, § 77-108; Ga. L. 1983, p. 1340, § 1; Ga. L. 1993, p. 632, § 1; Ga. L. 1994, p. 1955, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1994, "of felony offenses" was substituted for "of, felony of-

fenses," in the first sentence of paragraph (1) of subsection (b).

### JUDICIAL DECISIONS

**Constitutionality of section.** — This section is violative of the U.S. Const., Amend. 14 to the extent that it requires segregation of the races in the prisons and jails of Georgia. Otherwise, it remains in full force and effect. *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga.), aff'd, 393 U.S. 266, 89 S. Ct. 477, 21 L. Ed. 2d 425 (1968).

**Administrative enforcement of good-time credit provisions.** — The good-time credit provisions of this section work toward the end of encouraging good behavior among

inmates while incarcerated. The provisions are directly related to the duties of administration and are affirmatively delegated to the custodians of inmates by the legislature. A trial court would therefore be without jurisdiction to usurp this function by ordering that good-time credit be withheld until fines are paid. *Davis v. State*, 181 Ga. App. 498, 353 S.E.2d 7 (1987).

**Cited in** *Howington v. Wilson*, 213 Ga. 664, 100 S.E.2d 726 (1957).

### OPINIONS OF THE ATTORNEY GENERAL

**Automatic accrual of earned-time.** — The custodian of a county inmate was not required to take any affirmative action under former law to award earned-time, which was automatic. 1984 Op. Att'y Gen. No. U84-10.

**"Conversion" to good-time under subsection (c) requires** the custodian of an inmate in custody on December 31, 1983 to recompute the term of confinement by reducing that term by any period of time an inmate may have spent in a time-out status. 1984 Op. Att'y Gen. No. U84-10.

**Due process requirements for deduction of good-time.** — Since deductions of good-time from county misdemeanor in-

mates under paragraph (b)(2) amount to the deprivation of a liberty interest, the minimal procedures established by *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), must be followed; therefore, an inmate is entitled to (1) at least 24 hours written notice of the charges against him, (2) a hearing at which the inmate may, consistent with the needs and good order of the prison, call witnesses and present evidence, and (3) a written statement by the fact finders as to the evidence relied upon and reasons for the disciplinary action. 1984 Op. Att'y Gen. No. U84-10.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 21-23, 222 et seq. **C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 16, 144 et seq.

**42-4-8. Inquiry into contents of inmate record by grand jury; failure to comply with Code Section 42-4-7.**

It shall be the duty of the grand jury, at each term of the superior court held in the county, to inquire into the contents of the record kept by the sheriff as required by Code Section 42-4-7. If the record is not kept or is incorrectly kept, the grand jury shall so report to the court. Upon the report's being made, the judge presiding shall cause the district attorney to have the sheriff served with a rule requiring him to show cause why he should not be punished for contempt. The judge shall inquire into the facts and, if he finds that Code Section 42-4-7 has not been complied with, he shall impose a fine of not less than \$25.00 nor more than \$50.00 for the first offense and not more than \$100.00 and not less than \$50.00 for each subsequent offense. The fines shall be enforced and collected by attachment, as in other cases of attachments against sheriffs. (Ga. L. 1877, p. 111, § 2; Code 1882, § 366b; Penal Code 1895, § 1126; Penal Code 1910, § 1155; Code 1933, § 77-109; Ga. L. 1994, p. 97, § 42.)

**Cross references.** — Frequency with which grand jury must perform duties, § 15-12-71.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Grand Jury, §§ 26-29. **C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 124, 128.

**42-4-9. Conditions for receipt of federal prisoners.**

The keeper of a county jail may decline to receive a person from the custody of anyone acting under the authority of the United States government. He may receive the person if the consent of the authority having control of county matters is first obtained. If the keeper receives the person he shall have the same duties and responsibilities toward him as in the case of inmates committed under the authority of this state. (Orig. Code 1863, § 334; Code 1868, § 395; Code 1873, § 359; Code 1882, § 359; Ga. L. 1889, p. 47, § 2; Penal Code 1895, § 1123; Penal Code 1910, § 1152; Code 1933, § 77-106.)



## JUDICIAL DECISIONS

**Liability for mistreatment of federal prisoner.** — In the absence of this section there would be no liability on the part of a jailer for mistreatment of a United States prisoner whom a jailer is not required to receive. *Tate v. National Sur. Corp.*, 58 Ga. App. 874, 200 S.E. 314 (1938).

**Keeper of county jail officer of United States court.** — The keeper of a county jail

of a state, who receives prisoners for the federal government, and is paid for their maintenance, is an officer of the United States court. *In re Birdsong*, 39 F. 599 (S.D. Ga. 1889). See *Erwin v. United States*, 37 F. 470 (S.D. Ga. 1889), rev'd on other grounds, 47 U.S. 676, 13 S. Ct. 439, 37 L. Ed. 328 (1893).

## RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, § 4.

**42-4-10. Receipt of additional federal prisoners after initial acceptance.**

If the keeper of the jail consents to receive a person from the custody of federal authorities, as provided in Code Section 42-4-9, neither the jailer nor the county authorities shall refuse to receive any other person so committed by the authority of the United States government unless 20 days' prior written notice of the sheriff's refusal to receive any more persons committed by the federal authorities is given by him to the United States marshal or other federal officers charged with the custody of such persons. (Ga. L. 1889, p. 47, § 3; Penal Code 1895, § 1124; Penal Code 1910, § 1153; Code 1933, § 77-107.)

## RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Prisons and Rights of Prisoners, § 4.

**42-4-11. Procedure for transfer of person in custody upon change of venue.**

In all cases in which a change of venue is made, the sheriff of the county from which a person in custody is to be moved shall carry the person to the county to which the change of venue was directed and deliver him to the sheriff of such county, who shall then take charge of the person as in other cases. The sheriff of the county from which the person is to be moved shall carry with him and deliver to the sheriff the warrant under which the person was arrested or the commitment. (Ga. L. 1868, p. 133, § 1; Code 1873, § 4688; Code 1882, § 4688; Penal Code 1895, § 1129; Penal Code 1910, § 1158; Code 1933, § 77-112.)

**Cross references.** — Change of venue generally, Ga. Const. 1983, Art. VI, Sec. II, Para. VIII and § 17-7-150 et seq.

## JUDICIAL DECISIONS

**Official authorized to receive documents when change of venue granted.** — Where in a criminal case a change of venue is granted, a certified copy of the order for that purpose is required to be transmitted to the clerk of the superior court of the county to which the

change is made; but the original indictment and other papers in the case are required to be sent to that county. *Graham v. State*, 143 Ga. 440, 85 S.E. 328, 1917A Ann. Cas. 595 (1915).

#### 42-4-12. Penalty for refusal by officer to receive persons charged with or guilty of offense.

Except as otherwise provided in this Code section, any sheriff, constable, keeper of a jail, or other officer whose duty it is to receive persons charged with or guilty of an indictable offense who refuses to receive and take charge of such a person shall, upon conviction thereof, be guilty of a misdemeanor and shall be punished by a fine of not more than \$1,000.00. A sheriff, constable, keeper of a jail, or other officer whose duty it is to receive persons charged with or guilty of an indictable offense shall be authorized to refuse acceptance of any person who has not received medical treatment for obvious physical injuries or conditions of an emergency nature. Upon such refusal, it shall be the responsibility of the arresting agency to take the individual to a health care facility or health care provider in order to secure a medical release. Upon medical release by the health care facility or health care provider, the sheriff, constable, or keeper of the jail must assume custody of the individual; provided, however, that in all cases the sheriff, constable, or keeper of the jail must assume custody where no health care facility is located in the county in which the arrest occurred and, in such instances, the governing authority of the arresting agency shall pay all costs related to the medical release. (Cobb's 1851 Digest, p. 807; Code 1863, § 4380; Code 1868, § 4418; Code 1873, § 4486; Code 1882, § 4486; Penal Code 1895, § 285; Penal Code 1910, § 289; Code 1933, § 77-9902; Ga. L. 1996, p. 1638, § 1.)

The 1996 amendment, effective April 25, 1996, added the last three sentences; and, in the first sentence, substituted "Except as otherwise provided in this Code section, any sheriff, constable" for "Any sheriff, coroner, constable" and ", upon conviction thereof, be guilty of a misdemeanor and shall be punished by a fine of not more than

\$1,000.00" for "be punished upon conviction thereof by confinement for not less than two years nor longer than seven years and shall be dismissed from office".

**Law reviews.** — For review of 1996 legislation relating to jails, see 13 Ga. U. L. Rev. 269 and 273.

## JUDICIAL DECISIONS

**Implied right to refuse persons not charged with indictable offense.** — This section by implication gives sheriff a right to refuse to receive any prisoner who is not charged with or guilty of an indictable of-

fense, in that the only penalties provided are for refusal to receive persons charged with or guilty of indictable offenses. *Tate v. National Sur. Corp.*, 58 Ga. App. 874, 200 S.E. 314 (1938).

**Sheriff of county has a statutory duty to accept all city prisoners** and the county commissioners have authority to require him to do so. *Griffin v. Chatham County*, 244 Ga.

628, 261 S.E.2d 570 (1979).

**Cited in** *Smith v. Glen Falls Indem. Co.*, 71 Ga. App. 697, 32 S.E.2d 105 (1944).

### OPINIONS OF THE ATTORNEY GENERAL

**No surcharge payment as condition of serving sentence.** — A sheriff must accept into custody those individuals convicted of criminal offenses who have been sentenced

to a term of incarceration, and the sheriff may not require payment of a surcharge as a condition precedent to service of the sentence. 1992 Op. Att'y Gen. No. U92-4.

### 42-4-13. Possession of drugs, weapons, or alcohol by inmates.

(a) As used in this Code section, the term:

(1) "Alcoholic beverage" means and includes all alcohol, distilled spirits, beer, malt beverage, wine, or fortified wine.

(2) "Controlled substance" means a drug, substance, or immediate precursor in Schedules III through V of Code Sections 16-13-27 through 16-13-29.

(3) "Dangerous drug" has the same meaning as defined by Code Section 16-13-71.

(b) (1) Unless otherwise authorized by law, it shall be unlawful for an inmate of a jail to possess any controlled substance, dangerous drug, gun, pistol, or other dangerous weapon or any marijuana in a quantity of one ounce or less.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years.

(3) Notwithstanding the provisions of this subsection, possession of marijuana in a quantity greater than one ounce shall be punished as provided in Chapter 13 of Title 16.

(c) (1) Unless otherwise authorized by law, it shall be unlawful for an inmate of a jail to possess any alcoholic beverage.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a misdemeanor.

(d) (1) It shall be unlawful for any person to come inside the guard lines established at any jail with, or to give or have delivered to an inmate of a jail, any alcoholic beverage, controlled substance, dangerous drug, or any marijuana in a quantity of one ounce or less, or any gun, pistol, or other dangerous weapon without the knowledge and consent of the sheriff or the sheriff's designated representative or a detention facility administra-



tor or his or her designee; provided, however, that the provisions of this subsection shall not apply to nor prohibit the use of an alcoholic beverage by a clergyman or priest in sacramental services only.

(2) Except as otherwise provided in paragraph (3) of this subsection, any person who violates paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years.

(3) Notwithstanding the provisions of paragraph (2) of this subsection, the possession or distribution of a controlled substance or marijuana in a quantity greater than one ounce shall be punished as provided in Chapter 13 of Title 16. (Code 1981, § 42-4-13, enacted by Ga. L. 1987, p. 611, § 1; Ga. L. 1993, p. 630, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1989, the subsection (a) designation was added at the beginning of this Code section.

**Law reviews.** — For note on 1993 amendment of this section, see 10 Ga. St. U.L. Rev. 181 (1993).

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**Fingerprintable offense.** — Violation of subsection (c), which provides that it is a misdemeanor for an inmate of a jail to possess any alcoholic beverage, is not at this

time designated as an offense for which those charged with a violation are to be fingerprinted. 1987 Op. Att'y Gen. No. 87-21.

RESEARCH REFERENCES

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61, 62, 75.

ARTICLE 2

CONDITIONS OF DETENTION

OPINIONS OF THE ATTORNEY GENERAL

**Article does not repeal Ch. 2, T. 25.** — While this article deals, in part, with the same subject matter as the fire safety standards set forth in Ch. 2, T. 25 for certain jails, the General Assembly, in enacting this arti-

cle, apparently did not intend to impliedly amend Ch. 2, T. 25 and such construction is not necessary for a reasonable interpretation of this article. 1980 Op. Att'y Gen. No. 80-66.

RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 87-89, 91-97, 110, 174 et seq.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61-90, 124-129.

**ALR.** — Sex discrimination in treatment of jail or prison inmates, 12 ALR4th 1219.

Mandamus, under 28 USC § 1361, to obtain change in prison condition or release of federal prisoner, 114 ALR Fed. 225.

**42-4-30. Definitions.**

As used in this article, the term:

(1) "Detention facility" means a municipal or county jail used for the detention of persons charged with or convicted of either a felony, a misdemeanor, or a municipal offense.

(2) "Inmate" means a person who is detained in a detention facility by reason of being charged with or convicted of a felony, a misdemeanor, or a municipal offense.

(3) "Officer in charge" means the sheriff, if the detention facility is under his supervision, or the warden, captain, or superintendent having the supervision of any other detention facility. (Ga. L. 1973, p. 890, § 1; Ga. L. 1985, p. 149, § 42.)

**JUDICIAL DECISIONS**

**Cited** in *Cherokee County v. North Cobb Surgical Assocs., P.C.*, 221 Ga. App. 496, 471 S.E.2d 561 (1996).

**42-4-31. Required safety and security measures.**

(a) It shall be unlawful for any person having charge of or responsibility for any detention facility to incarcerate any person in the detention facility unless a full-time jailer is on duty at the detention facility at all times while a person is incarcerated therein. For purposes of this Code section, a full-time dispatcher may also serve simultaneously as a full-time jailer in the case of:

(1) A municipal detention facility with 12 or fewer inmates incarcerated therein if such dispatcher either:

(A) Is equipped with mobile telephone and radio equipment which will allow such dispatcher to perform the duties of a dispatcher and the duties of a full-time jailer at the same time; or

(B) Is provided with temporary assistance or relief from the duties of a dispatcher while performing the duties of a jailer; or

(2) A municipal detention facility of a municipal corporation having a population of 6,000 or less if such dispatcher is certified both as a jailer and a dispatcher by the Georgia Peace Officer Standards and Training Council.

(b) If the local governing authority having jurisdiction over a detention facility has knowledge that the facility is operating without a full-time jailer on duty while persons are incarcerated therein, each member of the local

governing authority having such knowledge and failing to attempt to correct the deficiency shall be in violation of this article.

(c) The officer in charge of a detention facility shall have the facility inspected semiannually by an officer from the state fire marshal's office or an officer selected by the Safety Fire Commissioner. Each detention facility shall be required to comply with this article with regard to fire safety and the applicable rules and regulations promulgated by the Safety Fire Commissioner. The inspecting officer shall fill out a form provided by the officer in charge and the form shall be posted in a conspicuous place by the officer in charge, thereby evidencing inspection of the facility.

(d) There shall be at least two separate keys for all locks at a detention facility, with one set in use and all duplicate keys safely stored under the control of a jailer or other administrative employee for emergency use. All security personnel must be familiar with the locking system of the detention facility and must be able immediately to release inmates in the event of a fire or other emergency. Regular locking and unlocking of door and fire escape locks shall be made to determine if they are in good working order. Any damaged or nonfunctioning security equipment shall be promptly repaired. (Ga. L. 1973, p. 890, § 2; Ga. L. 1990, p. 1371, § 1; Ga. L. 1991, p. 1009, § 1.)

**Cross references.** — Liability of sheriffs for misconduct of jailers, § 15-16-24. Regulation of fire hazards to persons and property generally, Ch. 2, T. 25.

#### RESEARCH REFERENCES

**ALR.** — Liability for death or injury to prisoner, 61 ALR 569.

#### **42-4-32. Sanitation and health requirements generally; meals; inspections; medical treatment.**

(a) All aspects of food preparation and food service shall conform to the applicable standards of the Department of Human Resources.

(b) All inmates shall be given not less than two substantial and wholesome meals daily.

(c) Sanitation inspections of both facilities and inmates shall be made as frequently as is necessary to ensure against the presence of unsanitary conditions. An official from the Department of Human Resources or an officer designated by the commissioner of human resources shall inspect the facilities at least once every three months. New inmates should be carefully classified, with adequate separation and treatment given as needed.

(d) The officer in charge or his designated representative shall assure that each inmate is observed daily, and a physician shall be immediately



called if there are indications of serious injury, wound, or illness. The instructions of the physician shall be strictly carried out. Ill inmates shall be furnished such food as is prescribed by the attending physician. (Ga. L. 1973, p. 890, § 3; Ga. L. 1977, p. 761, § 1; Ga. L. 1990, p. 135, § 2.)

**Cross references.** — Authority of grand § 15-12-78. Liability of sheriffs for misconduct of jailers, § 15-16-24.

#### 42-4-33. Penalty for violations of article.

Any person who violates this article shall be guilty of a misdemeanor. (Ga. L. 1973, p. 890, § 4.)

### ARTICLE 3

#### MEDICAL SERVICES FOR INMATES

**Code Commission notes.** — Ga. L. 1992, p. 2125, § 2, and Ga. L. 1992, p. 2942, § 1, both enacted a new Article 3 of Chapter 4. Pursuant to Code Section 28-9-5, in 1992, the article enacted by Ga. L. 1992, p. 2942, § 1, was redesignated Article 4 of Chapter 4.

#### 42-4-50. Definitions.

As used in this article, the term:

(1) "Detention facility" means a municipal or county jail used for the detention of persons charged with or convicted of either a felony, a misdemeanor, or a municipal offense.

(2) "Governing authority" means the governing authority of the county or municipality in which the detention facility is located.

(3) "Inmate" means a person who is detained in a detention facility by reason of being charged with or convicted of a felony, a misdemeanor, or a municipal offense. Such term does not include any sentenced inmate who is the responsibility of the State Department of Corrections.

(4) "Medical care" includes medical attention, dental care, and medicine and necessary and associated costs such as transportation, guards, room, and board.

(5) "Officer in charge" means the sheriff, if the detention facility is under his or her supervision, or the warden, captain, or superintendent having the supervision of any other detention facility. (Code 1981, § 42-4-50, enacted by Ga. L. 1992, p. 2125, § 2; Ga. L. 1995, p. 1059, § 1; Ga. L. 1996, p. 1081, § 1; Ga. L. 1996, p. 1264, § 1.)

**The 1995 amendment,** effective July 1, 1995, inserted " , workcamp, or other municipal or county detention facility" in paragraph (1) of subsection (a).

**The 1996 amendments.** — The first 1996 amendment, effective July 1, 1996, deleted " , workcamp, or other municipal or county detention facility" following "county jail" in

paragraph (1) of subsection (a). The second 1996 amendment, effective July 1, 1996, deleted the subsection (a) designation at the beginning; made identical changes to those made by the first amendment in paragraph (1); added present paragraphs (2) and (4); redesignated former paragraphs (2) and (3) as paragraphs (3) and (5), respectively; inserted a period following "municipal offense" and deleted "and who is insured under existing individual health insurance,

group health insurance, or prepaid medical care coverage or is eligible for benefits under Article 7 of Chapter 4 of Title 49, the 'Georgia Medical Assistance Act of 1977.'" at the end of the first sentence in paragraph (3); and inserted "or her" in paragraph (5).

**Law reviews.** — For note on 1992 enactment of this Code section, see 9 Ga. St. U.L. Rev. 310 (1992). For review of 1996 legislation relating to jails, see 13 Ga. St. U. L. Rev. 269 and 273.

### JUDICIAL DECISIONS

**Cited** in *Cherokee County v. North Cobb Surgical Assocs., P.C.*, 221 Ga. App. 496, 471 S.E.2d 561 (1996).

#### **42-4-51. Information as to inmate's health insurance or eligibility for benefits; access to medical services; liability for payment; inmate's liability for costs of medical care; procedure for recovery against inmate.**

(a) The officer in charge or his or her designee may require an inmate to furnish the following information:

(1) The existence of any health insurance, group health plan, or prepaid medical care coverage under which the inmate is insured;

(2) The eligibility for benefits to which the inmate is entitled under Article 7 of Chapter 4 of Title 49, the "Georgia Medical Assistance Act of 1977";

(3) The name and address of the third-party payor; and

(4) The policy or other identifying number.

(b) The officer in charge will provide a sick, injured, or disabled inmate access to medical services and may arrange for the inmate's health insurance carrier to pay the health care provider for the medical service rendered.

(c) The liability for payment for medical care described under subsection (b) of this Code section may not be construed as requiring payment by any person or entity, except by an inmate personally or his or her carrier through coverage or benefits described under paragraph (1) of subsection (a) of this Code section.

(d) If an inmate is not eligible for such health insurance benefits, then the inmate shall be liable for the costs of such medical care provided to the inmate and the assets and property of such inmate may be subject to levy and execution under court order to satisfy such costs. An inmate in a

detention facility shall cooperate with the governing authority in seeking reimbursement under this article for medical care expenses incurred by the governing authority for that inmate. An inmate who willfully refuses to cooperate as provided in this Code section shall not receive or be eligible to receive any good-time allowance or other reduction of time to be served.

(e) (1) An attorney for a governing authority may file a civil action to seek reimbursement from an inmate for the costs of medical care provided to such inmate while incarcerated.

(2) A civil action brought under this article shall be instituted in the name of the governing authority and shall state the date and place of sentence, the medical care provided to such inmate, and the amount or amounts due to the governing authority pursuant to this Code section.

(3) If necessary to protect the governing authority's right to obtain reimbursement under this article against the disposition of known property, the governing authority may seek issuance of an ex parte restraining order to restrain the defendant from disposing of the property pending a hearing on an order to show cause why the particular property should not be applied to reimbursement of the governing authority for the costs of medical care provided to the defendant as an inmate.

(4) To protect and maintain the property pending resolution of the matter, the court, upon request, may appoint a receiver.

(f) Before entering any order on behalf of the governing authority against the defendant, the court shall take into consideration any legal obligation of the defendant to support a spouse, minor children, or other dependents and any moral obligation to support dependents to whom the defendant is providing or has in fact provided support.

(g) The court may enter a money judgment against the defendant and may order that the defendant's property is liable for reimbursement for the costs of medical care provided to the defendant as an inmate.

(h) The sentencing judge and the sheriff of any county in which a prisoner's property is located shall furnish to the attorney for the governing authority all information and assistance possible to enable the attorney to secure reimbursement for the governing authority under this article.

(i) The reimbursements secured under this article shall be credited to the general fund of the governing authority to be available for general fund purposes. The treasurer of such governing authority may determine the amount due the governing authority under this article and render sworn statements thereof. These sworn statements shall be considered prima-facie evidence of the amount due.

(j) Nothing in this Code section shall be construed to relieve the governing authority, governmental unit, subdivision, or agency having the



physical custody of an inmate from its responsibility to pay for any medical and hospital care rendered to such inmate regardless of whether such individual has been convicted of a crime. (Code 1981, § 42-4-51, enacted by Ga. L. 1992, p. 2125, § 2; Ga. L. 1996, p. 1264, § 2.)

**The 1996 amendment**, effective July 1, 1996, inserted "or her" in subsections (a) and (c) and added subsections (d) through (j). The 1996 legislation did not reenact the language "or by or at the direction of the Department of Medical Assistance pursuant

to paragraph (2) of subsection (a) of this Code section" at the end of subsection (c).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1992, "third-party" was substituted for "third party" in paragraph (3) of subsection (a).

### JUDICIAL DECISIONS

**Cited in** Cherokee County v. North Cobb Surgical Assocs., P.C., 221 Ga. App. 496, 471 S.E.2d 561 (1996).

### ARTICLE 4

#### DEDUCTIONS FROM INMATE ACCOUNTS FOR EXPENSES

**Code Commission notes.** — Ga. L. 1992, p. 2125, § 2, and Ga. L. 1992, p. 2942, § 1, both enacted a new Article 3 of Chapter 4.

Pursuant to Code Section 28-9-5, in 1992, the article enacted by Ga. L. 1992, p. 2942, § 1, was redesignated Article 4 of Chapter 4.

#### 42-4-70. Definitions.

As used in this article, the term:

(1) "Detention facility" means a municipal or county jail used for the detention of persons charged with or convicted of either a felony, a misdemeanor, or a municipal offense.

(2) "Inmate" means a person who is detained in a detention facility by reason of being charged with or convicted of a felony, a misdemeanor, or a municipal offense.

(3) "Medical treatment" means each visit initiated by the inmate to an institutional physician; physician's extender, including a physician's assistant or a nurse practitioner; dentist; optometrist; or psychiatrist for examination or treatment.

(4) "Officer in charge" means the sheriff, if the detention facility is under his supervision, or the warden, captain, or superintendent having the supervision of any other detention facility. (Code 1981, § 42-4-70, enacted by Ga. L. 1992, p. 2942, § 1; Ga. L. 1995, p. 1059, § 2; Ga. L. 1996, p. 1081, § 2.)

**The 1995 amendment**, effective July 1, 1995, inserted " , workcamp, or other municipal or county detention facility" in paragraph (1).

**The 1996 amendment**, effective July 1, 1996, deleted “, workcamp, or other municipal or county detention facility” following “county jail” in paragraph (1).

**Editor's notes.** — Ga. L. 1995, p. 1059, effective July 1, 1995, purported to amend paragraph (1) of subsection (a); however, this Code section does not contain a subsec-

tion (a), and the amendment is deemed to apply to paragraph (1) following the undesignated introductory paragraph.

**Law reviews.** — For note on 1992 enactment of this Code section, see 9 Ga. St. U.L. Rev. 310 (1992). For review of 1996 legislation relating to jails, see 13 Ga. St. U. L. Rev. 269 and 273.

### JUDICIAL DECISIONS

**Cited in** *Cherokee County v. North Cobb Surgical Assocs., P.C.*, 221 Ga. App. 496, 471 S.E.2d 561 (1996).

#### **42-4-71. Deduction of costs from inmate's account for destruction of property, medical treatment, and other causes; exception for certain medical costs.**

(a) The officer in charge may establish by rules or regulations criteria for a reasonable deduction from money credited to the account of an inmate to:

(1) Repay the costs of:

(A) Public property willfully damaged or destroyed by the inmate during his incarceration;

(B) Medical treatment for injuries inflicted by the inmate upon himself or others;

(C) Searching for and apprehending the inmate when he escapes or attempts to escape; such costs to be limited to those extraordinary costs incurred as a consequence of the escape; or

(D) Quelling any riot or other disturbance in which the inmate is unlawfully involved;

(2) Defray the costs paid by a municipality or county for medical treatment for an inmate, which medical treatment has been requested by the inmate, provided that such deduction from money credited to the account of an inmate shall not exceed \$5.00 for each such occurrence of treatment received by the inmate at the inmate's request; provided, further, that if the balance in an inmate's account is \$10.00 or less, such fee shall not be charged; and provided, further, that in the event that the costs of medical treatment of an inmate have been collected from said inmate pursuant to Code Section 42-4-51, there shall be no deductions from money credited to the account of an inmate under the provisions of this paragraph for the cost of such medical treatment.

(b) The provisions of paragraph (2) of subsection (a) of this Code section shall not apply in any case where an officer of the detention facility

or a medical practitioner determines that an inmate is in need of medical treatment.

(c) All sums collected for medical treatment shall be reimbursed to the inmate if such inmate is acquitted or otherwise exonerated of all charges for which the inmate was being held. (Code 1981, § 42-4-71, enacted by Ga. L. 1992, p. 2942, § 1; Ga. L. 1993, p. 304, § 1; Ga. L. 1996, p. 1264, § 3.)

**The 1996 amendment**, effective July 1, 1996, added the last proviso at the end of paragraph (2) of subsection (a).

**Cross references.** — Repayment of costs as condition of probation, § 42-8-35(8).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, "and provided, further, that in the event" was substituted for "provided, however, that in the event" in paragraph (a)(2).

## ARTICLE 5

### REGIONAL JAIL AUTHORITIES

**Effective date.** — This article became effective April 7, 1995.

#### 42-4-90. Short title.

This article shall be known and may be cited as the "Regional Jail Authorities Act." (Code 1981, § 42-4-90, enacted by Ga. L. 1995, p. 292, § 1.)

#### 42-4-91. Statement of authority; policy of state.

(a) This article is enacted pursuant to authority granted to the General Assembly by the Constitution of Georgia. Each authority created by this article is created for nonprofit and public purposes; and it is found, determined, and declared that the creation of each such authority and the carrying out of its corporate purposes is in all respects for the benefit of the people of this state and that the authority is an institution of purely public charity and will be performing an essential governmental function in the exercise of the power conferred upon it by this article. For such reasons, the state covenants from time to time with the holders of the bonds issued under this article that such authority shall be required to pay no taxes or assessments imposed by the state or any of its counties, municipal corporations, political subdivisions, or taxing districts upon any property acquired by the authority or under its jurisdiction, control, possession, or supervision or leased by it to others; or upon its activities in the operation or maintenance of any such property; or upon any rentals, charges, purchase price, installments, or otherwise; and that the bonds of such authority, their transfer, and the income therefrom shall at all times be exempt from taxation within the state. The tax exemption provided in this Code section shall include exemption from sales and use tax on property purchased by the authority or for use by the authority.



(b) It is the express policy of the State of Georgia that any authority created by this article shall be authorized to enter into agreements with any county or municipality within the same county as the regional jail authority for the purpose of building, owning, and operating a jail facility for the county or municipality. (Code 1981, § 42-4-91, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 1.)

**The 1996 amendment**, effective July 1, 1996, in subsection (b), inserted “or municipality within the same county as the regional

jail authority” and added “or municipality” at the end.

#### **42-4-92. Definitions.**

As used in this article, the term:

(1) “Authority” means each public body corporate and politic created pursuant to this article.

(2) “Cost of project” means all costs of site preparation and other start-up costs; all costs of construction; all costs of real and personal property required for the purposes of the jail facilities related thereto, including land and any rights or undivided interest therein, easements, franchises, fees, permits, approvals, licenses, and certificates and the securing of such permits, approvals, licenses, and certificates and all machinery and equipment, including motor vehicles which are used for jail functions; financing charges and interest prior to and during construction and during such additional period as the authority may reasonably determine to be necessary for the placing of the jail in operation; costs of engineering, architectural, and legal services; cost of plans and specifications and all expenses necessary or incident to determining the feasibility or practicability of the jail; administrative expenses; and such other expenses as may be necessary or incidental to the financing authorized in this article. The costs of any jail may also include funds for the creation of a debt service reserve, a renewal and replacement reserve, and such other reserves as may be reasonably required by the authority for the operation of any jail and as may be authorized by any bond resolution or trust agreement or indenture pursuant to the provisions of which the issuance of any such bonds may be authorized. Any obligation or expense incurred for any of the foregoing purposes shall be regarded as a part of the costs of the jail and may be paid or reimbursed as such out of the proceeds of user fees, or revenue bonds or notes issued under this article for such jail, or from other revenues obtained by the authority.

(3) “County” means any county of this state or governmental entity formed by the consolidation of a county and one or more municipal corporations.

(4) “County regional jail authority” means a regional jail authority formed by counties pursuant to this article.

(5) "Governing body" means the elected or duly appointed officials constituting the governing body of each county in the state.

(6) "Management committee" means a regional jail authority management committee created pursuant to Code Section 42-4-95.

(7) "Municipal regional jail authority" means a regional jail authority formed by municipalities within the same county pursuant to this article.

(8) "Municipality" means any municipal corporation of this state.

(9) "Project" means a jail and all other structures including electric, gas, water, and other utilities and facilities, equipment, personal property, and vehicles which are deemed by the authority as necessary and convenient for the operation of the jail. (Code 1981, § 42-4-92, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 2; Ga. L. 1997, p. 143, § 42.)

**The 1996 amendment**, effective July 1, 1996, added present paragraphs (4), (7) and (8), and redesignated paragraphs (4), (5), and (6) as paragraphs (5), (6), and (9), respectively.

**The 1997 amendment**, effective March 28, 1997, part of an Act to correct errors and omissions in the Code, redesignated paragraphs (7) and (8) as paragraphs (8) and (7), respectively.

**42-4-93. Creation of authorities; ordinance or resolution required; agreement; approval of sheriff; exemption from Georgia State Financing and Investment Commission Act.**

(a) Any two or more counties may jointly form an authority, to be known as the county regional jail authority for such counties. Any two or more municipalities within the same county may jointly form an authority, to be known as the municipal regional jail authority for such municipalities. Municipalities located in more than one county may participate in municipal regional jail authorities in each county in which the municipality is located. No authority shall transact any business or exercise any powers under this article until the governing authorities of the counties or municipalities involved declare, by ordinance or resolution, that there is a need for an authority to function and until the governing authorities authorize the chief elected official of each county or municipality to enter into an agreement with the other counties or municipalities participating in the authority for the activation of an authority and such agreement is executed. Such authorities shall be public bodies, corporate and politic, and instrumentalities of the State of Georgia. A copy of the ordinance or resolution and agreement among participant counties or participant municipalities shall be filed with the Secretary of State who shall maintain a record of all authority activities under this article.

(b) No county may be included in an authority without approval of the sheriff of the participant county.

(c) Article 2 of Chapter 17 of Title 50, the "Georgia State Financing and Investment Commission Act," shall not apply to any authority created under this Code section. (Code 1981, § 42-4-93, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 3.)

**The 1996 amendment**, effective July 1, 1996, in subsection (a), inserted "county" in the first sentence; added the second and third sentences; inserted "or municipalities" and "or municipality" and substituted

"counties or municipalities participating in the authority" for "county or counties" in the fourth sentence; and added "or participant municipalities" in the last sentence.

**42-4-94. Board of directors; members; election of officers; expenses; duties; addition of counties or municipalities to authority.**

(a) Control and management of the authority shall be vested in a board of directors. Each county participating in an authority shall appoint the sheriff of the county for the term of such sheriff's office. One other member from each participating county shall be appointed for a four-year term. Each municipality participating in an authority shall appoint two people to serve on the board of directors, each for a four-year term. For each county or municipal regional jail authority board of directors, an additional member shall be appointed by the directors themselves. The directors shall elect one of their members as chairperson and another as vice chairperson and shall also elect a secretary and a treasurer or a secretary-treasurer, either of whom may, but need not be, a director. The directors shall receive no compensation for their services but shall be reimbursed for actual expenses incurred in the performance of their duties. The directors may make bylaws and regulations for the governing of the authority and may delegate to one or more of the officers, agents, and employees of the authority such powers and duties as may be deemed necessary and proper.

(b) It is the duty of the board of directors to erect or repair, when necessary, the jail and to furnish the jail with all the furniture necessary for the different rooms, offices, and cells. The jail shall be erected and kept in order and repaired at the expense of the authority under the direction of the board of directors which is authorized to make all necessary contracts for that purpose. The board of directors shall pass an annual budget sufficient for the efficient and effective operation of the jail.

(c) Members of the board of directors of an authority formed pursuant to this Code section may agree that additional counties, if a county regional jail authority, or additional municipalities, if a municipal regional jail authority, may become members of such authority subsequent to its formation upon an affirmative vote of two-thirds of the members of such board of directors under such terms as may be imposed by such two-thirds of the members of such board of directors. (Code 1981, § 42-4-94, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 4.)



**The 1996 amendment**, effective July 1, 1996, in subsection (a), substituted "an authority" for "the authority" in the second sentence; added the fourth sentence; and substituted "For each county or municipal regional jail authority board of directors, an

additional" for "An additional" at the beginning of the fifth sentence; and inserted ", if a county regional jail authority, or additional municipalities, if a municipal regional jail authority," in subsection (c).

**42-4-95. Management committee of county regional jail authority; management and operation of municipal regional jail authority.**

(a) The jail of a county regional jail authority shall be managed and operated by a regional jail authority management committee composed of all of the sheriffs from the participant counties. The county regional jail authority management committee shall have all of the responsibilities provided in Code Section 15-16-24 and this chapter, including the employment and supervision of all personnel employed to operate the jail. The sheriffs shall elect one of their members as chairperson and another as vice chairperson and shall also elect a secretary who may or may not be a member of the committee. The committee shall receive no compensation for their services but shall be reimbursed for actual expenses incurred in the performance of their duties. The committee may delegate to one or more of the officers, agents, and employees of the committee such powers and duties as may be deemed necessary and proper.

(b) In the event that the county regional jail authority consists of an even number of counties, the sheriffs shall then elect one member, who may or may not be a member of the authority's board of directors, to serve on the management committee.

(c) The board of directors of a municipal regional jail authority shall hire or contract with a person, firm, corporation, or local government to manage and operate the regional jail. Such person, firm, corporation, or local government shall have all of the responsibilities provided in this chapter for municipal jails and jailers, including the employment and supervision of all personnel employed to operate the jail. (Code 1981, § 42-4-95, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 5.)

**The 1996 amendment**, effective July 1, 1996, in subsection (a), inserted "of a county regional jail authority" in the first sentence and "county" near the beginning

of the second sentence; inserted "county regional jail" in subsection (b); and added subsection (c).

**42-4-96. Quorums; voting requirements.**

(a) A majority of the board of directors shall constitute a quorum for the transaction of business of the authority. However, any action with respect to any project of the authority must be approved by the affirmative vote of not less than a majority of the directors.

(b) A majority of the regional jail authority management committee shall constitute a quorum for the transaction of business of the management committee. (Code 1981, § 42-4-96, enacted by Ga. L. 1995, p. 292, §. 1.)

#### **42-4-97. Powers of authority.**

Each authority shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including, but without limiting the generality of the foregoing, the power:

(1) To bring and defend actions except to the extent the authority has governmental immunity, venue being located in the host county of any project of the authority. The authority shall have no governmental immunity against suits by bondholders or their investors;

(2) To adopt and amend the corporate seal;

(3) To acquire, construct, improve, or modify, to place into operation, or to operate or cause to be placed in operation and operated, a jail or jails within the counties in which the authority is activated and subject to execution of agreements with appropriate political subdivisions affected within other counties or municipalities and to pay all or part of the cost of any such jail or jails from the proceeds of revenue bonds of the authority or from any contribution or loan by persons, firms, or corporations or from any other contribution or use fees, all of which the authority is authorized to receive, accept, and use;

(4) To acquire, in its own name, by purchase on such terms and conditions and in such manner as it may deem proper, or by condemnation in accordance with any and all laws applicable to the condemnation of property for public use, or by gift, grant, lease, or otherwise, real property or rights and easements therein and franchises and personal property necessary or convenient for its corporate purposes, which purposes shall include, but shall not be limited to, the constructing or acquiring of a jail or jails; the improving, extending, adding to, reconstructing, renovating, or remodeling of any jail or jails or parts thereof already constructed or acquired; or the demolition to make room for such jail or any part thereof and to insure the same against any and all risks as such insurance may, from time to time, be available. The authority may also use such property and rent or lease the same to or from others or make contracts with respect to the use thereof or sell, lease, exchange, transfer, assign, pledge, or otherwise dispose of or grant options for any such property in any manner which the authority deems to the best advantage of itself and its purposes, provided that the powers to acquire, use, and dispose of property as set forth in this paragraph shall include the power to acquire, use, and dispose of any interest in such property, whether divided or undivided, which acquisition may result in the ownership of such property or any part thereof in common with any other party or parties, public or private;

(5) To make contracts and leases and to execute all instruments necessary or convenient, including contracts for construction of jails and leases of jails or contracts with respect to the use of jails which it causes to be acquired or constructed on a negotiated basis without competitive bid, provided that all private persons, firms, and corporations, this state, and all political subdivisions, departments, instrumentalities, or agencies of the state or of local government are authorized to enter into contracts, leases, or agreements with the authority, upon such terms and for such purposes as they deem advisable; and, without limiting the generality of the provisions of this paragraph, authority is specifically granted to municipal corporations and counties and to the authority to enter into contracts, lease agreements, or other undertakings relative to the furnishing of project activities and facilities or either of them by the authority to such municipal corporations and counties and by such municipal corporations and counties to the authority for a term not exceeding 50 years;

(6) To exercise any one or more of the powers, rights, and privileges conferred by this Code section either alone or jointly or in common with one or more other public or private parties. In any such exercise of such powers, rights, and privileges jointly or in common with others with respect to the construction, operation, and maintenance of jail facilities, the authority may own an undivided interest in such facilities with any other party with which it may jointly or in common exercise the rights and privileges conferred by this article and may enter into an agreement or agreements with respect to any such jail facility with the other party or parties participating therein; and such agreement may contain such terms, conditions, and provisions, consistent with this article, as the parties thereto shall deem to be in their best interests, including, but not limited to, provisions for the construction, operation, and maintenance of such jail facility by any one or more of the parties to such agreement, which party or parties shall be designated in or pursuant to such agreement as agent or agents on behalf of itself and one or more of the other parties thereto, or by such other means as may be determined by the parties thereto, and including provisions for a method or methods of determining and allocating, among or between the parties, costs of construction, operation, maintenance, renewals, replacements, improvements, and disposal with respect to such facility, such agent shall be governed by the laws and regulations applicable to such agent as a separate legal entity and not by any laws or regulations which may be applicable to any of the other participating parties; provided, however, the agent shall act for the benefit of the public. Notwithstanding anything contained in any other law to the contrary, pursuant to the terms of any such agreement, the authority may delegate its powers and duties with respect to the construction, operation, and maintenance of such facility to the party acting as agent; and all actions taken by such agent in accordance with the provisions of such agreement may be binding upon the authority without further action or approval of the authority;



(7) To accept, receive, and administer gifts, grants, appropriations, and donations of money, materials, and property of any kind, including loans and grants from the United States, this state, a unit of local government, or any agency, department, authority, or instrumentality of any of the foregoing, upon such terms and conditions as the United States, this state, a unit of local government, or such agency, department, authority, or instrumentality shall impose; to administer trusts; and to sell, lease, transfer, convey, appropriate, and pledge any and all of its property and assets;

(8) To do any and all things necessary or proper for the accomplishment of the objectives of this article and to exercise any power usually possessed by private corporations performing similar functions which is not in conflict with the Constitution and laws of this state, including the power to employ professional and administrative staff and personnel by and through the management committee and to retain legal, engineering, fiscal, accounting, and other professional services; the power to purchase all kinds of insurance, including, without limitation, insurance against tort liability and against risks of damage to property; the power to borrow money for any of the corporate purposes of the authority; the power to indemnify and hold harmless any parties contracting with the authority or its agents from damage to persons or property; and the power to act as self-insurer with respect to any loss or liability; provided, however, that obligations of the authority other than revenue bonds, for which provision is made in this article, shall be payable from the general funds of the authority and shall not be a charge against any special fund allocated to the payment of revenue bonds;

(9) To borrow money and issue its revenue bonds and bond anticipation notes from time to time and to use the proceeds thereof for the purpose of paying all or part of the cost of any jail, including the cost of extending, adding to, or improving such jail, or for the purpose of refunding any such bonds of the authority theretofore issued; and otherwise to carry out the purposes of this article and to pay all other costs of the authority incident to, or necessary and appropriate to, such purposes, including the provision of funds to be paid into any fund or funds to secure such bonds and notes, provided that all such bonds and notes shall be issued in accordance with the procedures and subject to the limitations set forth in Code Section 42-4-100; and

(10) To fix rentals and other charges which any user shall pay to the authority for the use of a jail or part or combination thereof, and to charge and collect the same, and to lease and make contracts with political subdivisions and agencies with respect to the use of any part of any jail or jails. Such rentals and other charges shall be so fixed and adjusted with respect to the aggregate thereof from the jail or any part thereof so as to provide a fund with other revenues of such jail, if any, to

pay the cost of maintaining, repairing, and operating the jail, including reserves for extraordinary repairs and insurance, unless such cost shall be otherwise provided for, which costs shall be deemed to include the expenses incurred by the authority on account of the jail for water, light, sewer, and other services furnished by other facilities at such jail. (Code 1981, § 42-4-97, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 6; Ga. L. 1997, p. 143, § 42.)

**The 1996 amendment**, effective July 1, 1996, near the middle of paragraph (3), inserted "or municipalities" and substituted "any contribution" for "any combination".

**The 1997 amendment**, effective March 28, 1997, part of an Act to correct errors and omissions in the Code, substituted "42-4-100" for "42-4-98" in paragraph (9).

**42-4-98. Duties and responsibilities of sheriffs and governing bodies imposed upon management committee and authority.**

(a) Every duty and responsibility of the sheriff of a participant county to operate a jail in an efficient and orderly manner is imposed upon the management committee and to that extent the sheriff of a participant county is relieved of those duties with respect to the operation of a jail including specifically, but without limitation, Code Section 15-16-24 and this chapter.

(b) Every duty and responsibility of the governing body of a participant county to erect, repair, and furnish a jail in an efficient and orderly manner is imposed on the authority as provided in the agreement between the participating government and the authority and to that extent the county is relieved, including specifically but without limitation, of those duties imposed by Code Sections 36-9-5 through 36-9-11, with respect to jails. The authority shall adopt a budget for the operation of the jail that reasonably and adequately provides for the personnel, training of personnel, equipment, facilities, and other items necessary for the management committee to operate the jail. The authority shall hold budget hearings not less than 120 days prior to the adoption of the budget. (Code 1981, § 42-4-98, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1997, p. 143, § 42.)

**The 1997 amendment**, effective March 28, 1997, part of an Act to correct errors and omissions in the Code, revised language in subsection (a) of this Code section.

**42-4-99. Limitation on liability of members, officers, or employees.**

Except for willful or wanton misconduct, neither the members of the authority nor any officer or employee of the authority, acting on behalf thereof and while acting within the scope of his or her responsibilities, shall be subject to any liability resulting from:

- (1) The design, construction, ownership, maintenance, operation, or management of a jail or jails; or

(2) The carrying out of any of the discretionary powers or duties expressly provided for in this article. (Code 1981, § 42-4-99, enacted by Ga. L. 1995, p. 292, § 1.)

**42-4-100. Bonds or other obligations; requirements and procedure for issuance.**

(a) Subject to the limitations and procedures provided by this Code section, the obligations of any authority evidenced by bonds, bond anticipation notes, trust indentures, deeds to secure obligations, security agreements, or mortgages executed in connection therewith may contain such provisions not inconsistent with law as shall be determined by the board of directors of the authority. The authority, in such instruments, may provide for the pledging of all or any part of its revenues, income, or charges and for the mortgaging, encumbering, or conveying of all or any part of its real or personal property; may covenant against pledging any or all of its revenues, income, or charges; and may further provide for the disposition of proceeds realized from the sale of any bonds and bond anticipation notes, for the replacement of lost, destroyed, stolen, or mutilated bonds and notes, and for the payment and redemption of such bonds and notes. Similarly, subject to the limitations and procedures of this Code section, undertakings of any authority may prescribe the procedure by which bondholders and noteholders may enforce rights against the authority and provide for rights upon breach of any covenant, condition, or obligation of the authority. Bonds, resolutions, trust indentures, mortgages, or deeds to secure obligations executed by an authority and bond anticipation notes executed by an authority may contain such provisions not otherwise contrary to law as the authority shall deem necessary or desirable.

(b) The proceeds derived from the sale of all bonds and bond anticipation notes issued by an authority shall be held and used for the ultimate purpose of paying, directly or indirectly as permitted in this article, all or part of the cost of any jail, including the cost of extending, financing, adding to, or improving such jail, or for the purpose of refunding any bond anticipation notes issued in accordance with this article or refunding any previously issued bonds of the authority.

(c) All bonds and bond anticipation notes issued by an authority shall be revenue obligations of such authority and may be made payable out of any revenues or other receipts, funds, or moneys of the authority, subject only to any agreements with the holders of other bonds or bond anticipation notes or to particular security agreements pledging any particular revenues, receipts, funds, or moneys.

(d) Issuance by an authority of one or more series of bonds or bond anticipation notes for one or more purposes shall not preclude it from issuing other bonds or notes in connection with the same jail or with any



other jails, but the proceeding wherein any subsequent bonds or bond anticipation notes shall be issued shall recognize and protect any prior pledge or mortgage made in any prior security agreement or made for any prior issue of bonds or bond anticipation notes, unless in the resolution authorizing such prior issue the right is expressly reserved to the authority to issue subsequent bonds or bond anticipation notes on a parity with such prior issue.

(e) An authority shall have the power and is authorized, whenever revenue bonds of the authority have been validated as provided in this article, to issue, from time to time, its notes in anticipation of the issuance of such bonds as validated and to renew from time to time any such notes by the issuance of new notes, whether the notes to be renewed have or have not matured. The authority may issue notes only to provide funds which would otherwise be provided by the issuance of the bonds as validated. The notes may be authorized, sold, executed, and delivered in the same manner as bonds. As with its bonds, the authority may sell such notes at public or private sale. Any resolution or resolutions authorizing notes of the authority or any issue thereof may contain any provision which the authority is authorized to include in any such resolution or resolutions; and the authority may include in any notes any terms, covenants, or conditions which it is authorized to include in any bonds. Validation of such bonds shall be a condition precedent to the issuance of the notes, but it shall not be required that such notes be judicially validated. Bond anticipation notes shall not be issued in an amount exceeding the par value of the bonds in anticipation of which they are to be issued.

(f) The interest rate on or rates to be borne by any bonds, notes, or other obligations issued by the authority shall be fixed by the board of directors of the authority. Any limitation with respect to interest rates found in Article 3 of Chapter 82 of Title 36 or in the usury laws of this state shall not apply to obligations issued under this article.

(g) All revenue bonds issued by an authority under this article will be issued and validated under and in accordance with Article 3 of Chapter 82 of Title 36, except as provided in subsection (f) of this Code section and except as specifically set forth below:

(1) Revenue bonds issued by an authority shall be fully registered and shall be subject to such exchangeability and transferability provisions as the bond resolution authorizing the issuance of such bonds or any indenture or trust agreement may provide;

(2) Revenue bonds shall bear a certificate of validation. The signature of the clerk of the superior court of the judicial circuit in which the issuing authority is located may be made on the certificate of validation of such bonds by facsimile or by manual execution, stating the date on which such bonds were validated; and such entry shall be original

evidence of the fact of judgment and shall be received as original evidence in any court in this state; and

(3) In lieu of specifying the rate or rates of interest which revenue bonds to be issued by an authority are to bear, the notice to the district attorney or the Attorney General and the notice to the public of the time, place, and date of the validation hearing may state that the bonds, when issued, will bear interest at a rate not exceeding a maximum per annum rate of interest specified in such notes or, in the event the bonds are to bear different rates of interest for different maturity dates, that none of such bonds shall bear interest at such rate or rates without regard to any limitation contained in any other statute or law of this state; provided, however, that nothing contained in this paragraph shall be construed as prohibiting or restricting the right of the authority to sell such bonds at a discount, even if in so doing the effective interest cost resulting therefrom would exceed the maximum per annum interest rate specified in such notices.

(h) The term "cost of project" shall have the meaning prescribed in paragraph (2) of Code Section 42-4-92 whenever referred to in bond resolutions of an authority, bonds, and bond anticipation notes issued by an authority, or notices and proceedings to validate such bonds. (Code 1981, § 42-4-100, enacted by Ga. L. 1995, p. 292, § 1.)

**42-4-101. Bonds or other obligations not indebtedness of state or political subdivision; payment.**

No bonds or other obligations of and no indebtedness incurred by any authority shall constitute an indebtedness or obligation of the State of Georgia or of any county, municipal corporation, or political subdivision thereof, nor shall any act of any authority in any manner constitute or result in the creation of an indebtedness of this state or of any such county, municipal corporation, or political subdivision. However, provisions of this Code section shall not preclude counties, municipal corporations, or other political subdivisions from choosing to guarantee the bonds, indebtedness, or other obligations of a jail authority as part of its demonstration of adequate financial responsibility pursuant to this article. All such bonds and obligations shall be payable solely from the revenues therein pledged to such payment, including pledged rentals, sales proceeds, insurance proceeds, and condemnation awards; and no holder or holders of any such bond or obligation shall ever have the right to compel any exercise of the taxing power of this state or of any county, municipal corporation, or political subdivision thereof or to enforce the payment thereof against any property of the state or of any such county, municipal corporation, or political subdivision. (Code 1981, § 42-4-101, enacted by Ga. L. 1995, p. 292, § 1.)

**42-4-102. Construction of article; bonds not subject to regulation under Georgia Securities Act; power of counties and municipalities to activate authorities.**

(a) This article shall be liberally construed to effect the purposes hereof. Sale or issuance of bonds by any authority shall not be subject to regulation under Chapter 5 of Title 10, the "Georgia Securities Act of 1973," or any other law.

(b) A county or any number of counties or a municipality or any number of municipalities shall have the right to activate any authority under this article, notwithstanding the existence of any other authority having similar powers or purposes within the county or a municipal corporation created pursuant to any general law or amendment to the Constitution of this state. However, nothing in this article shall be construed as repealing, amending, superseding, or altering the organization of or abridging the powers of such authorities as are now in existence. (Code 1981, § 42-4-102, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 7.)

**The 1996 amendment**, effective July 1, 1996, inserted "or a municipality or any number of municipalities" in the first sentence of subsection (b).

**42-4-103. Operation and finance agreement required; withdrawal from authority.**

(a) Failure of a participant county or participant municipality to execute an operation and finance agreement duly adopted by the authority at a regularly scheduled meeting or a meeting called for that purpose within 60 days after such agreement has been executed by two or more participant counties or participant municipalities shall constitute a withdrawal from the authority.

(b) Any participant county or participant municipality may withdraw from the authority subject to any contract, obligation, or agreement with the authority, but no participant county or participant municipality shall be permitted to withdraw from any authority after any obligation has been incurred by the authority. The governing body of the participant county or participant municipality wishing to withdraw from an existing authority shall signify its desire by resolution or ordinance. (Code 1981, § 42-4-103, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 8.)

**The 1996 amendment**, effective July 1, 1996, inserted "or participant municipality" near the beginning of subsection (a) and in three places in subsection (b) and inserted "or participant municipalities" near the end of subsection (a).



**42-4-104. Authority of county or municipality to establish and maintain jail or jail-holding facility.**

Notwithstanding anything contained in this article, no participant county or participant municipality shall be prohibited from establishing and maintaining any jail or jail-holding facility. Notwithstanding any other provision in this chapter, such jails shall be operated as provided in the laws of this state as if the county or municipality was not a participant in the regional jail authority. (Code 1981, § 42-4-104, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 9.)

**The 1996 amendment**, effective July 1, 1996, inserted "or participant municipality" in the first sentence and, in the second sentence, substituted "such jails shall be

operated" for "sheriffs shall operate the county jail" and inserted "or municipality" near the end.

**42-4-105. Immunity of authorities from liability.**

Regional jail authorities shall be carrying out an essential governmental function on behalf of participant counties or participant municipalities and are, therefore, given immunity from liability for carrying out their intended functions. (Code 1981, § 42-4-105, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 10.)

**The 1996 amendment**, effective July 1, 1996, inserted "or participant municipalities".

## CHAPTER 5

## CORRECTIONAL INSTITUTIONS OF STATE AND COUNTIES

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## PENAL INSTITUTIONS

- Sec.  
42-5-37. Employees in control of inmates prohibited from receiving profit from inmate labor; penalties.  
42-5-37.1. Compensation of employees of institutions operated by department for damages to wearing apparel caused by inmate action.  
42-5-38. Making false statement as to age to procure employment.  
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### Article 3

#### Conditions of Detention Generally

- 42-5-50. Transmittal of information on convicted persons; place of detention; custody of inmates sentenced prior to January 1, 1983.  
42-5-51. Jurisdiction over certain misdemeanor offenders; designation of place of confinement of inmates; reimbursement of county; transfer of inmates to federal authority.  
42-5-52. Classification and separation of inmates generally; placement of juvenile offenders and of females; transfer of mentally diseased, alcoholic, drug addicted, or tubercular inmates.  
42-5-52.1. Submission to HIV test; separate housing for HIV infected persons.  
42-5-53. Establishment of county correctional institutions; supervision by department; quota of inmates; funding; confinement and withdrawal of inmates.  
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42-5-55. Deductions from inmate accounts for payment of certain damages and medical costs; limit on deductions; fee for managing inmate accounts.

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42-5-56. [Repealed].  
42-5-57. Institution of rehabilitation programs; provision of opportunities for educational, religious, and recreational activities.  
42-5-58. Prohibition against corporal punishment; use of handcuffs, leg chains, and other restraints; permissible punishment generally.  
42-5-59. Employment of inmates in the local community.  
42-5-60. Hiring out of inmates; sale of products produced by inmates; disposition of proceeds; payment to inmates for services.  
42-5-60.1. Utilization of inmates of county correctional institutions for work on outdoor assignments during inclement weather; supervision of inmates.  
42-5-61. Services and benefits to be furnished inmates discharged by department or county correctional institutions.  
42-5-62. Forfeiture of contraband.  
42-5-63. Unauthorized possession of weapon by inmate.  
42-5-64. (For effective date, see note) Educational programming.

### Article 4

#### Granting Special Leaves, Emergency Leaves, and Limited Leave Privileges

- 42-5-80. Authorization and general procedure for granting special leave.  
42-5-81. Issuance of special leave; filing.  
42-5-82. Purposes for which special leave may be granted.  
42-5-83. Emergency leaves.  
42-5-84. Delegation of authority to issue limited leave privileges; records.  
42-5-85. Leave privileges of inmates serving murder sentences.

### Article 5

#### Awarding Earned-time Allowances

- 42-5-100. Termination of board's power to award earned-time allowances.  
42-5-101. Work incentive credits.



## ARTICLE 1

## GENERAL PROVISIONS

**Cross references.** — Escape of person in lawful custody, and as to assault on, resistance to, etc., officer or guard within penal institution, § 16-10-52 et seq.

**Editor's notes.** — By resolution (Ga. L. 1987, p. 3550), the General Assembly directed the Board of Corrections to designate the correctional facility in Forsyth, Monroe County, Georgia, as the "A.L. 'Al' Burruss Correctional Training Center" and to affix an appropriate plaque at the entrance to that center indicating that designation.

By resolution (Ga. L. 1988, p. 334), the General Assembly designated the correctional facility in Pennville, Chattooga

County, Georgia, as the "Forest Hays, Jr., Correctional Institution."

By resolution (Ga. L. 1988, p. 1470), the General Assembly created the Commission on Criminal Sanctions and Correctional Facilities, to be abolished January 1, 1990.

By resolution (Ga. L. 1991, p. 1203), the General Assembly designated the probation detention center in Fulton County, Georgia as the "J. Carrell Larmore Probation Detention Center."

By resolution (Ga. L. 1992, p. 3109), the General Assembly designated the correctional institution in Mitchell County as the "Jimmy Autry Correctional Institution."

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 13, 14, 21-23.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 7-9, 12-19.

**ALR.** — Validity and construction of prison regulation of inmates' possession of

personal property, 66 ALR4th 800.

State prisoner's right to personally appear at civil trial to which he is a party — state court cases, 82 ALR4th 1063.

Propriety of telephone testimony or hearings in prison proceedings, 9 ALR5th 451.

## 42-5-1. Definitions.

As used in this chapter, the term:

(1) "Board" means the Board of Corrections.

(2) "Commissioner" means the commissioner of corrections.

(3) "Department" means the Department of Corrections. (Code 1981, § 42-5-1; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1.)

**Cross references.** — Notification to Department of Corrections, Uniform Superior Court Rules, Rule 35.1.

**Editor's notes.** — This Code section was

created as part of the Code revision and was thus enacted by Ga. L. 1981, Ex. Sess., p. 8 (Code enactment Act).

#### 42-5-2. Responsibilities of governmental unit with custody of inmate generally; costs of emergency and follow-up care; access to medical services or hospital care for inmates.

(a) Except as provided in subsection (b) of this Code section, it shall be the responsibility of the governmental unit, subdivision, or agency having the physical custody of an inmate to maintain the inmate, furnishing him

food, clothing, and any needed medical and hospital attention; to defend any habeas corpus or other proceedings instituted by or on behalf of the inmate; and to bear all expenses relative to any escape and recapture, including the expenses of extradition. Except as provided in subsection (b) of this Code section, it shall be the responsibility of the department to bear the costs of any reasonable and necessary emergency medical and hospital care which is provided to any inmate after the receipt by the department of the notice provided by subsection (a) of Code Section 42-5-50 who is in the physical custody of any other political subdivision or governmental agency of this state, except a county correctional institution, if the inmate is available and eligible for the transfer of his custody to the department pursuant to Code Section 42-5-50. Except as provided in subsection (b) of this Code section, the department shall also bear the costs of any reasonable and necessary follow-up medical or hospital care rendered to any such inmate as a result of the initial emergency care and treatment of the inmate. With respect to state inmates housed in county correctional institutions, the department shall bear the costs of direct medical services required for emergency medical conditions posing an immediate threat to life or limb if the inmate cannot be placed in a state institution for the receipt of this care. The responsibility for payment will commence when the costs for direct medical services exceed an amount specified by rules and regulations of the Board of Corrections. The department will pay only the balance in excess of the specified amount. Except as provided in subsection (b) of this Code section, it shall remain the responsibility of the governmental unit having the physical custody of an inmate to bear the costs of such medical and hospital care, if the custody of the inmate has been transferred from the department pursuant to any order of any court within this state. The department shall have the authority to promulgate rules and regulations relative to payment of such medical and hospital costs by the department.

(b) (1) The officer in charge will provide an inmate access to medical services or hospital care and may arrange for the inmate's health insurance carrier to pay the health care provider for the services or care rendered as provided in Article 3 of Chapter 4 of this title.

(2) With respect to an inmate covered under Article 3 of Chapter 4 of this title, the costs of any medical services, emergency medical and hospital care, or follow-up medical or hospital care as provided in subsection (a) of this Code section for which a local governmental unit is responsible shall mean the costs of such medical services and hospital care which have not been paid by the inmate's health insurance carrier or the Department of Medical Assistance. (Ga. L. 1956, p. 161, § 13; Ga. L. 1982, p. 1361, §§ 1, 2; Ga. L. 1983, p. 3, § 31; Ga. L. 1986, p. 493, § 1; Ga. L. 1992, p. 2125, § 3.)

**Cross references.** — Habeas corpus generally, Ch. 14, T. 9.

**Law reviews.** — For article surveying legislative and judicial developments in Georgia

local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 310 (1992).

### JUDICIAL DECISIONS

**County was responsible for detainee's medical care** where he was injured while being taken into custody by the county sheriff's department and, but for the seriousness of his injuries, would have been placed in the county's detention facility. *Cherokee County v. North Cobb Surgical Assocs., P.C.*, 221 Ga. App. 496, 471 S.E.2d 561 (1996).

**Use of prisoners' funds for medical expenses.** — As it is the city's responsibility to pay all medical and hospital expenses for a prisoner in its custody, using a fund recovered from the prisoner after a shoot-out to pay these expenses, the city, in effect, appropriated the entire fund to itself. *Johnson v. Mayor of Carrollton*, 249 Ga. 173, 288 S.E.2d 565 (1982) (decided prior to 1982 amend-

ment, which added last four sentences).

**Charged detainees are inmates.** — The term "inmate" means not only a person who has been convicted of an offense, but also a person who has been detained by reason of being charged with a crime, such that county was responsible for the medical expenses of an individual arrested and charged with theft, regardless of his procedural status, and, additionally, of the self-inflicted nature of his injuries. *Macon-Bibb County Hosp. Auth. v. Houston County*, 207 Ga. App. 530, 428 S.E.2d 374 (1993).

**Cited in** *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967); *McKenney v. State*, 140 Ga. App. 402, 231 S.E.2d 149 (1976).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — Most of the following annotations were taken from opinions rendered prior to the 1982 amendment of this section, which added the last four sentences of subsection (a).

**Responsibility for medical bills accrued for treatment.** — See 1986 Op. Att'y Gen. No. U86-23.

**Medical bills arising from injury of work release inmate.** — Private employer is primarily responsible for payment of medical bills arising from injuries, fatal or otherwise, received by work release inmate while on job, but upon default by employer, the Department of Offender Rehabilitation (Corrections) is ultimately responsible for paying for those medical services. 1981 Op. Att'y Gen. No. 81-27.

**Medical care and expenses of escaped prisoners.** — The board may pay only those medical expenses incurred by an escaped prisoner, as a result of his wrecking a stolen automobile, which may properly be classified as an expense relating to the recapture of the prisoner. 1967 Op. Att'y Gen. No. 67-218.

**Responsibility for providing medical and dental care** rests upon the governmental unit having physical custody of an inmate; there is, however, no statutory prohibition

against taking an inmate to his private physician or dentist for specialized treatment at the expense of the inmate; however, while the Board of Corrections may permit an inmate to receive private specialized treatment, the inmate has no right to demand that the board permit such treatments. 1967 Op. Att'y Gen. No. 67-336.

**Liability for medical expenses depends upon physical custody.** — A municipality is only liable for a prisoner's medical expenses incurred while the prisoner is in the physical custody of the municipality. 1990 Op. Att'y Gen. No. U90-8.

When custody of a prisoner ceases by virtue of the prisoner's posting an appearance bond, the municipality's responsibility for needed medical care and hospital attention ceases. At that point the municipality ceases to have physical custody of the individual, since he is free to leave at any time he desires. 1990 Op. Att'y Gen. No. U90-8.

**Chiropractic aid.** — There is no prohibition against chiropractic aid to prisoners, however, such should be furnished only upon request of the prisoner. 1960-61 Op. Att'y Gen. p. 357.

**Medical expenses of assignees to medical centers.** — Board is liable for medical expenses of probationers and parolees as-



signed to community centers operated by the board. 1974 Op. Att'y Gen. No. 74-129.

**Medical expenses of woman resulting from assault and rape by escaped prisoner.** — The board may not pay the medical expenses of an 83-year-old woman who was assaulted and raped by an escaped inmate from the Georgia Industrial Institute. 1967 Op. Att'y Gen. No. 67-301.

**Defense of habeas corpus proceeding.** — Governmental unit having physical custody of prisoner is required to defend any habeas corpus proceeding, including an appeal therefrom; it is the responsibility of the attorney representing the governmental unit having physical custody of a prisoner to defend the appeal in the Supreme Court of this state. 1969 Op. Att'y Gen. No. 69-39.

**Responsibility for extradition proceedings**

**expenses.** — There is an initial responsibility for payment of expenses incurred by an agency within the executive authority of this state initiating extradition proceedings, and that agency is under an obligation to secure the indemnification of the funds which it was obligated to expend relative to the escape of a prisoner from the county having physical custody of the prisoner at the time of the escape. 1970 Op. Att'y Gen. No. 70-13.

**Responsibility for asylum expenses of escaped fugitive.** — The ultimate responsibility for bearing the expenses incurred in the asylum state attending upon the arrest and delivery of the escaped fugitive rests with the governmental unit having the physical custody of the prisoner. 1970 Op. Att'y Gen. No. 70-13.

### RESEARCH REFERENCES

**ALR.** — What justifies escape or attempt to escape, or assistance in that regard, 70 ALR2d 1430.

Liability of prison authorities for injury to prisoner directly caused by assault by other prisoner, 41 ALR3d 1021.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 ALR3d 678.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 ALR4th 773.

Right of state prison authorities to administer neuroleptic or antipsychotic drugs to prisoner without his or her consent — state cases, 75 ALR4th 1124.

### 42-5-3. Department's responsibility for trial costs and expenses.

The whole costs of the case and expenses of the trial involving an inmate of the state penal system charged with the violation of any criminal statute shall be borne by the department, provided the offense was committed by the inmate within the confines of a state correctional institution or was the crime of escape or attempted escape. The costs and expenses of the trial shall include, but shall not be limited to, the cost of the sheriff, bailiff, clerks, jurors, and jail fees and shall be paid by the department to the governing authority of the county in which the trial was conducted, for proper disposition. (Orig. Code 1863, § 4690; Code 1868, § 4714; Code 1873, § 4812; Code 1882, § 4812; Penal Code 1895, § 1174; Penal Code 1910, § 1230; Code 1933, § 77-401; Ga. L. 1964, p. 462, § 1; Ga. L. 1975, p. 1590, § 1.)

**Cross references.** — Payment of costs of criminal proceedings generally, Ch. 11, T. 17.

## JUDICIAL DECISIONS

**Fund out of which expenses paid.** — No reference is made in this section or elsewhere in this Code as to the fund from which the expense is to be paid, and it seems that

the provision that it shall be paid out of the penitentiary fund, remains unrepealed. *Campbell v. Davison*, 162 Ga. 221, 133 S.E. 468 (1926).

## OPINIONS OF THE ATTORNEY GENERAL

**Costs of trial conducted after discharge from custody.** — Board is liable for costs of trial of former inmate in custody of department tried for crime committed while inmate was incarcerated in custody of department, but whose trial will take place after the inmate is discharged from custody. 1979 Op. Att'y Gen. No. 79-64.

**Costs include incarceration in local jail during trial** but not for incarceration, if any, at the local jail after the trial and before the

inmate is returned to the custody of the Department of Offender Rehabilitation (Corrections). 1979 Op. Att'y Gen. No. 79-64.

**Other costs and fees department obligated to pay.** — The Department of Corrections is obligated to pay all costs and expenses listed on the statement submitted to the department, including court-appointed attorneys' fees and the per diem of the court reporter. 1963-65 Op. Att'y Gen. p. 743.

## 42-5-4. Payment of trial costs and expenses.

The clerk of the superior court from the county in which the trial specified in Code Section 42-5-3 was conducted shall submit a statement of the charges, certified by the judge of the superior court or the judge of the city court, to the department, which shall pay the charges out of the appropriations provided therefor in accordance with schedules authorized by law. (Ga. L. 1964, p. 462, § 2.)

## 42-5-5. Reimbursement of court costs and transportation and detention expenses incurred in trying escapees from state correctional institutions.

The department is authorized and directed to reimburse the clerk of the court for court costs incurred in trying a defendant for the crime of escape when the escape is from a state correctional institution and to reimburse the sheriff of the county wherein the trial takes place for the expense of transporting the defendant from the place of detention to court for trial and returning the defendant from the court to the place of detention, such reimbursement to be at the rate of 10¢ per mile. (Ga. L. 1971, p. 572, § 1.)

## OPINIONS OF THE ATTORNEY GENERAL

**Costs limited to actual costs.** — This section limits payment of court costs in cases related to escapees from state institutions to actual costs incurred by the clerks of courts in which such escapees are tried; in addition,

it allows reimbursement to the sheriffs of the counties in which the trials take place only for the expense of transporting the defendants to and from their places of detention. 1972 Op. Att'y Gen. No. 72-43.

#### 42-5-6. Participation by county correctional institutions in state purchasing contracts.

County correctional institutions may participate in all state purchasing contracts for the purpose of providing materials and supplies to state or county inmates. (Ga. L. 1975, p. 908, § 2.)

**Cross references.** — State purchasing generally, § 50-5-50 et seq.

#### 42-5-7. Sudden or unusual death of inmate.

Whenever any inmate dies suddenly or under unusual circumstances in any correctional institution, the warden or superintendent of that institution shall immediately notify the commissioner and shall also notify the coroner of the county in which the death occurs. The warden or superintendent is also directed to furnish the department with a copy of the findings of the coroner's inquest, together with any other information available that would be of use to the commissioner in determining the cause of death. (Ga. L. 1956, p. 161, § 25.)

**Cross references.** — Reimbursement of counties for expenses of burial of inmates, § 36-12-5. Requirement of autopsy and inquest upon death of inmate occurring when physician not present or as a result of violence, § 45-16-27.

**Administrative rules and regulations.** — Death and interment, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Board of Offender Rehabilitation, Chapter 415-2-4.20.

### OPINIONS OF THE ATTORNEY GENERAL

**Notification of next of kin of inmates' death.** — Neither the warden nor any staff member at the Georgia State Prison is legally required to notify the next of kin of the

death of an inmate who has been transferred to a hospital. 1967 Op. Att'y Gen. No. 67-445.

### RESEARCH REFERENCES

**ALR.** — Liability for death or injury to prisoner, 61 ALR 569.

Liability of prison authorities for injury to

prisoner directly caused by assault by other prisoner, 41 ALR3d 1021.

#### 42-5-8. Notification upon escape of inmate.

In addition to any all-points bulletin issued by the department notifying all local law enforcement agencies within the state of the escape of any inmate from the custody of the department, the department shall also, within 72 hours of the discovery of the escape, notify all parties who in the judgment of the commissioner have a legitimate need to know that the inmate has escaped and who have requested in writing that the department



notify the party prior to the inmate's release from custody. (Ga. L. 1980, p. 393, § 1; Ga. L. 1985, p. 149, § 42.)

**42-5-9. Notification of district attorney and local law enforcement agencies of projected release date of inmate.**

At least 15 days prior to the projected release date of any inmate scheduled to be released pursuant to the authority of the department, each district attorney and all local law enforcement agencies throughout the state shall be notified of the projected release date by the department. The notification required by this Code section shall be accomplished by publishing the necessary information in the *Georgia Criminal Activity Bulletin* published and disseminated by the Georgia Bureau of Investigation. (Ga. L. 1980, p. 393, § 2.)

**42-5-10. Promulgation of rules governing plans and specifications for new correctional institutions; certification of acceptability of old facilities by state fire marshal.**

The board shall prescribe by rule and regulation the required plans and specifications defining the size and type of construction and materials to be employed in constructing all state and county correctional institutions. The specifications shall require that the buildings be as nearly free from fire hazards and as nearly escape-proof as is possible under all circumstances. A certificate of approval from the state fire marshal shall be conclusive as to the acceptability of all old state or county correctional institutions from a standpoint of fire hazard. No county shall establish a county correctional institution until its establishment and the plans and specifications thereof have been approved by the board. (Ga. L. 1956, p. 161, § 17.)

**Administrative rules and regulations.** — State of Georgia, Rules of Georgia Board of Building and housing standards, Official Offender Rehabilitation, Chapter 415-2-2.  
Compilation of Rules and Regulations of

**OPINIONS OF THE ATTORNEY GENERAL**

**Dormitory standard set by board cannot fall below standard set by Safety Fire Commissioner.** — The Board of Offender Rehabilitation (Corrections) has authority to require a prison dormitory of any standard, so long as the standard is not below that set by the Georgia Safety Fire Commission (now Safety Fire Commissioner). 1954-56 Op. Att'y Gen. p. 526.

**42-5-11. General prohibition against receipt of remuneration in regard to assignment, transfer, or status of inmate.**

(a) It shall be unlawful for anyone other than a duly licensed attorney who is an active member in good standing of the State Bar of Georgia and who is not a member of the General Assembly to accept a fee, money, or

other remuneration, other than actual expenses, for contacting, in any manner, the commissioner, any employee of the department, or any member of the board in an attempt to influence the commissioner, employee, or board member concerning a transfer of an inmate from one correctional institution to another or concerning the status and assignment of an inmate within a correctional institution.

(b) Any person who receives any fee, money, or other remuneration other than actual expenses, in violation of subsection (a) of this Code section, shall be guilty of a misdemeanor. (Ga. L. 1975, p. 1218, § 1.)

**42-5-12. Receipt of remuneration by state officials in regard to assignment, transfer, or status of inmate.**

(a) It shall be unlawful for members of the General Assembly or any other state elected or appointed official to accept a fee, money, or other remuneration for contacting, in any manner, the commissioner, any employee of the department, or any member of the board in an attempt to influence the commissioner, employee, or board member concerning a transfer of an inmate from one correctional institution to another or concerning the status and assignment of an inmate within a correctional institution.

(b) Nothing in this Code section shall be construed so as to prohibit:

(1) Members of the General Assembly or other state elected or appointed officials from appearing before or contacting the commissioner, employees of the department, or members of the board when their official duties require them to do so;

(2) Members of the General Assembly or other state elected or appointed officials from requesting information from and presenting information to the commissioner, employees of the department, or members of the board on behalf of constituents when no compensation, gift, favor, or anything of value is accepted, either directly or indirectly, for such services; or

(3) Members of the General Assembly or other state elected or appointed officials from contacting the commissioner, any employee of the department, or any member of the board on behalf of any person so long as there is no fee, money, or other remuneration being paid or received for such contacting.

(c) Nothing in this Code section shall be construed to apply to the acceptance of compensation, expenses, and allowances received by members of the General Assembly or any other state elected or appointed official for his duties as a member or official.

(d) Nothing contained in this Code section shall preclude any attorney from contacting a client who may be in a correctional institution or from

making any reasonable contact with employees of the department to the extent that the contact with employees may be necessary to contact his client.

(e) Any person violating this Code section shall be guilty of a misdemeanor. (Ga. L. 1975, p. 1218, § 3.)

#### OPINIONS OF THE ATTORNEY GENERAL

**Inspection of correspondence between inmate and attorney.** — Prison officials may inspect correspondence between attorneys and their clients; in addition to the prison-

er's general correspondence; reasonable censorship of such correspondence may be imposed. 1967 Op. Att'y Gen. No. 67-314.

#### 42-5-13. Record of person contacting commissioner, department, or board on behalf of inmate.

The department shall maintain a complete written record of every person contacting the commissioner, any employee of the department, or any member of the board concerning a transfer of an inmate from one correctional institution to another or concerning the status and assignment of an inmate within a correctional institution. The record shall include the name and address of the person contacting the commissioner, employee, or board member and the reason for the contact. (Ga. L. 1975, p. 1218, § 2.)

#### 42-5-14. Establishment of guard lines and signs at state or county correctional institutions.

Guard lines shall be established by the warden, superintendent, or his designated representative in charge at the various state or county correctional institutions in the same manner that land lines are established, except that, at each corner of the lines, signs must be used on which shall be plainly stamped or written: "Guard line of \_\_\_\_\_." Signs shall also be placed at all entrances and exits for vehicles and pedestrians at the institutions and at such intervals along the guard lines as will reasonably place all persons approaching the guard lines on notice of the location of the institutions. (Ga. L. 1903, p. 71, § 3; Penal Code 1910, § 1231; Code 1933, § 77-403; Ga. L. 1961, p. 45, § 1.)

#### JUDICIAL DECISIONS

**Cited in** Cox Communications, Inc. v. Lowe, 173 Ga. App. 812, 328 S.E.2d 384 (1985).



**42-5-15. Crossing of guard lines with weapons, intoxicants, or drugs without consent of warden or superintendent.**

(a) It shall be unlawful for any person to come inside the guard lines established at any state or county correctional institution with a gun, pistol, or any other weapon or with or under the influence of any intoxicating liquor, amphetamines, biphethamines, or any other hallucinogenic or other drugs, without the knowledge or consent of the warden, superintendent, or his designated representative.

(b) Any person who violates this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than four years. (Ga. L. 1903, p. 71, § 1; Penal Code 1910, § 1232; Code 1933, § 77-404; Ga. L. 1961, p. 45, § 1; Ga. L. 1971, p. 220, § 1.)

**JUDICIAL DECISIONS**

**Cited in** Cox Communications, Inc. v. (1985); Howard v. State, 185 Ga. App. 465, Lowe, 173 Ga. App. 812, 328 S.E.2d 384 364 S.E.2d 600 (1988).

**OPINIONS OF THE ATTORNEY GENERAL**

**Correctional staff are authorized to search visitors** entering or leaving correctional institutions; these searches may be conducted by regular members of the correctional staff, properly supervised and trained; they should conduct searches according to clear guidelines prepared for them by the Department of Offender Rehabilitation (Corrections). 1974 Op. Att’y Gen. No. 74-146.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 78-82. **C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61, 62, 102-105.

**42-5-16. Trading with inmates without consent of warden or superintendent.**

It shall be unlawful for any person to trade or traffic with, buy from, or sell any article to an inmate without the knowledge and consent of the warden, superintendent, or the designated representative in charge. (Ga. L. 1903, p. 71, § 2; Penal Code 1910, § 1233; Code 1933, § 77-405; Ga. L. 1961, p. 45, § 1.)

**OPINIONS OF THE ATTORNEY GENERAL**

**Paid interview with inmate.** — An interview with an inmate, for which the inmate is paid, is an illegal transaction unless consummated with the knowledge and approval of the warden or deputy warden in charge of the prisoner. 1969 Op. Att’y Gen. No. 69-299. **Payment for blood collected from inmate.** — A hospital may collect blood from an inmate and pay him a fee for it with the

approval of the appropriate warden or deputy warden. 1969 Op. Att'y Gen. No. 69-21.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 106.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, § 75.

#### 42-5-17. Loitering near inmates after being ordered to desist.

It shall be unlawful for any person to loaf, linger, or stand around where inmates are employed or kept after having been ordered by the warden, superintendent, or designated representative in charge of the inmates to desist therefrom. (Ga. L. 1903, p. 71, § 5; Penal Code 1910, § 1234; Code 1933, § 77-406; Ga. L. 1961, p. 45, § 1.)

**Cross references.** — Prohibition against solicitation of business by professional bondsmen at places where prisoners are confined, § 17-6-52.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 78-86.

**ALR.** — Validity of loitering statutes and ordinances, 25 ALR3d 836.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 102-105.

#### 42-5-18. Giving weapons, intoxicants, drugs, or other items to inmates without consent of warden or superintendent; possession of same by inmate.

(a) It shall be unlawful for any person to obtain, to procure for, or to give to an inmate a gun, pistol, or any other weapon, any intoxicating liquor, amphetamines, biphethamines, or any other hallucinogenic drugs or other drugs, regardless of the amount, or any other article or item, without the knowledge and consent of the warden, superintendent, or his designated representative.

(b) Any inmate found to be in possession of a gun, pistol, or any other weapon, any intoxicating liquor, amphetamines, biphethamines, or any other hallucinogenic drugs or other drugs, regardless of the amount, or any other item given to said inmate in violation of subsection (a) of this Code section shall be prosecuted as set forth in Code Section 42-5-19. (Ga. L. 1976, p. 1506, § 2; Ga. L. 1984, p. 593, § 1.)

**Cross references.** — Similar provisions regarding furnishing of alcoholic beverages to inmates of jails, penal institutions, correc-

tional facilities, or other lawful places of confinement, § 3-3-25.

JUDICIAL DECISIONS

**“Weapon” defined.** — Jury’s finding that a “water bug” (a device used to bring a liquid to a boil), which defendant threw at correctional officers, was a “weapon,” within the meaning of subsection (b), was not unreasonable. *Culbertson v. State*, 193 Ga. App. 9, 386 S.E.2d 894 (1989).

OPINIONS OF THE ATTORNEY GENERAL

**Applicability.** — This section is applicable only when the items referred to are obtained or procured for or given to a convict. It is not applicable where the items referred to are obtained or procured for or given to a prisoner being held in a county jail who has not yet been convicted of any crime. 1980 Op. Att’y Gen. No. U80-12.

RESEARCH REFERENCES

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61, 62, 75.      conveying contraband to state prisoner, 64 ALR4th 902.  
**ALR.** — Nature and elements of offense of

42-5-19. Penalty for violating Code Section 42-5-16, 42-5-17, or 42-5-18.

Any person who violates Code Section 42-5-16, 42-5-17, or 42-5-18 shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years. (Ga. L. 1961, p. 45, § 1; Ga. L. 1976, p. 1506, § 1.)

RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 78-86, 106.      Prisoners, §§ 61, 62, 75, 102-105.  
**C.J.S.** — 72 C.J.S., Prisons and Rights of      **ALR.** — Validity of loitering statutes and ordinances, 25 ALR3d 836.

42-5-20. Alcohol or Drug Use Risk Reduction Program.

The department shall provide within the correctional system an Alcohol or Drug Use Risk Reduction Program. The program shall be made available to every person sentenced to the custody of the state whose criminal offense or history indicates alcohol or drug involvement; provided, however, that the provisions of this Code section shall not apply to a person who has been sentenced to the punishment of death or those deemed mentally incompetent. (Code 1981, § 42-5-20, enacted by Ga. L. 1995, p. 625, § 1.)

**Effective date.** — This Code section became effective July 1, 1995.      enactment of this section, see 12 Ga. St. U.L. Rev. 301 (1995).  
**Law reviews.** — For note on the 1995



**42-5-21. Family Violence Counseling Program.**

The department shall provide within the correctional system a Family Violence Counseling Program. The program shall be made available to every person sentenced to the custody of the state who committed an offense which has been identified to involve family violence as such term is defined in Code Section 19-13-1; provided, however, that the provisions of this Code section shall not apply to a person who has been sentenced to the punishment of death or to those deemed mentally incompetent. (Code 1981, § 42-5-21, enacted by Ga. L. 1996, p. 1113, § 1.)

**Effective date.** — This Code section became effective July 1, 1996.

**ARTICLE 2****WARDENS, SUPERINTENDENTS, AND OTHER PERSONNEL**

**Cross references.** — Indemnification of prison guards, etc., for death or disablement in line of duty, § 45-9-80 et seq.

Personnel requirements, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Board of Offender Rehabilitation, Chapter 415-2-1.

**Administrative rules and regulations.** —

**42-5-30. Qualifications for wardens, superintendents, and other personnel; appointment of wardens of county correctional institutions.**

The board shall by rule and regulation define the qualifications for wardens, superintendents, and other personnel employed in the state and county correctional institutions. The board shall by rule and regulation specify appropriate titles of personnel so employed, but no such personnel shall be known as or designated by the board as “guards” or “prison guards.” The wardens and deputy wardens of the various county correctional institutions shall be appointed by the governing authority of the county, subject to approval of the board, and shall serve at the pleasure of the county or the board. (Ga. L. 1956, p. 161, § 18; Ga. L. 1984, p. 639, § 1; Ga. L. 1993, p. 417, § 1.)

**JUDICIAL DECISIONS**

**Proceedings for removal of warden.** — A proceeding before the prison commission (now Board of Corrections) for the removal of a warden is not “litigation” within the meaning of Ga. Const. 1877, Art. VII, Sec. VI, Para. II (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I). Hence, the governing authority

of a county has no authority to employ an attorney to represent it in a proceeding before the prison commission (now Board of Corrections) for the discharge of a warden. *Humber v. Dixon*, 147 Ga. 480, 94 S.E. 363 (1917) (decided under Penal Code 1910, § 1192).

### OPINIONS OF THE ATTORNEY GENERAL

**This section provides for two types of wardens:** those at "state-operated institutions" under § 42-2-9 and those "appointed by the governing authority of the county," under this section; a person cannot be a warden within the state penal system unless he is an employee either of the state or a county authorized to maintain a county correctional institution under the supervision of the Board of Corrections. 1973 Op. Att'y Gen. No. 73-72.

**Authority to issue rules establishing qualifications for wardens.** — The Board of Offender Rehabilitation (Corrections) has the authority to issue rules establishing the practical experience and educational background necessary for the position of warden of a county correctional institution. 1973 Op. Att'y Gen. No. 73-41.

It is within ambit of board to decide what is "experience" and when it is "equivalent" for purposes of satisfying educational requirements and the board may use its power to remove wardens and prisoners to ensure that county wardens do in fact possess the requisite qualifications. 1973 Op. Att'y Gen. No. 73-41.

**Recourse when county institutions fail to hire qualified wardens.** — If a county correctional institution fails to employ a warden duly qualified according to the requirements set forth by the board, the board may remove all the prisoners from that institution. 1973 Op. Att'y Gen. No. 73-41.

**Eighteen-year-olds may legally be hired for correctional officers.** 1974 Op. Att'y Gen. No. 74-138.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 63A Am. Jur. 2d, Public Officers and Employees, § 162.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, § 15.

#### 42-5-31. Oath of office of wardens and superintendents, their deputies, and other correctional officers.

Before entering upon the duties of their office, wardens and superintendents, their deputies, and other correctional officers or employees shall take and subscribe, before some officer authorized to administer oaths, the following oath:

"I do solemnly swear (or affirm) that I will support and defend the Constitutions of the United States of America and the State of Georgia and that I will faithfully perform and discharge the duties of my office conscientiously and without malice or partiality, to the best of my ability. So help me God." (Penal Code 1910, § 1197; Code 1933, § 77-311; Ga. L. 1968, p. 1155, § 1; Ga. L. 1984, p. 639, § 2.)

### JUDICIAL DECISIONS

**Liability for acts committed by convicts.** — Warden of a public works camp (now county correctional institution) will not be held liable for torts of convicts on mere averment that he was negligent "in permitting said convicts to roam the roads of county and state in a truck, without any guard," whereby injuries resulted from a

collision of the truck with the plaintiff's car, as it was discretionary with the warden to determine how and in what manner convicts employed outside confines of the camp (now county correctional institution) doing work in connection with the operation it should be allowed to go at large, and wardens acting in a discretionary capacity, will

not be liable unless guilty of willfulness, fraud, malice, or corruption, or unless they knowingly act wrongfully, and not according to their honest convictions of duty. *Price v. Owen*, 67 Ga. App. 58, 19 S.E.2d 529 (1942)

(decided under former Code 1933, §§ 77-307, 77-311, and 77-313).

**Cited in** *Cleveland v. State*, 260 Ga. 770, 399 S.E.2d 472 (1991).

#### RESEARCH REFERENCES

**C.J.S.** — 67 C.J.S., Oaths and Affirmations, §§ 4, 6, 7.

injury to prisoner directly caused by assault by other prisoner, 41 ALR3d 1021.

**ALR.** — Liability of prison authorities for

#### 42-5-32. Bonds of superintendents, wardens, and other officials and employees.

(a) Before any state or county correctional institution or other facility operating under the jurisdiction of the board shall be approved to receive inmates, the board shall require the warden, superintendent, or other chief custodial officer of the institution to execute a bond, in an amount as the board may require, with good securities to be approved by it, such bond to be not less than \$10,000.00, payable to the Governor and his successors in office and conditioned upon the following:

(1) To account faithfully for all public and other funds or property coming into the principal's custody, control, care, or possession; and

(2) To discharge truly and faithfully all the duties imposed upon him by law or by the rules and regulations of the board.

(b) The board may also require that any other officials, employees, or agents of the department or of the various penal institutions referred to in subsection (a) of this Code section shall give bond as referred to in subsection (a) of this Code section, in an amount to be determined by the board, but in no case to be less than \$5,000.00.

(c) All bonds given under this Code section shall be liable for any breach of the conditions specified in paragraphs (1) and (2) of subsection (a) of this Code section by a deputy, agent, or subordinate of the principal, whether expressed therein or not; and all such bonds shall be subject to and governed by all the provisions of Chapter 4 of Title 45 which are not in conflict with this Code section. The costs of bonds obtained for wardens and other officials or employees of the county correctional institutions shall be paid for by the county. The costs of bonds obtained for superintendents and other officials or employees of the state correctional institutions and of the department shall be paid for by the state. (Penal Code 1910, § 1197; Code 1933, § 77-311; Ga. L. 1956, p. 161, § 20; Ga. L. 1957, p. 477, § 5.)

**Cross references.** — Official bonds generally, Ch. 4, T. 45.



## JUDICIAL DECISIONS

**Cited in** *Irwin v. Arrendale*, 117 Ga. App. 834 (1968); *Price v. Arrendale*, 119 Ga. App. 1, 159 S.E.2d 719 (1967); *Fidelity-Phenix Ins. Co. v. Mauldin*, 118 Ga. App. 401, 163 S.E.2d 589, 168 S.E.2d 193 (1969).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 179. 63A Am. Jur. 2d, Public Officers and Employees, § 487 et seq.  
**ALR.** — Leave of court as prerequisite to action on statutory bond, 2 ALR 563.  
 Personal liability of policeman, sheriff, or similar peace officer on his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker, 41 ALR3d 700.

#### 42-5-33. Submission of monthly reports to commissioner by wardens and superintendents.

The wardens or superintendents of all state or county correctional institutions shall send monthly reports to the commissioner showing the names of all inmates held in custody. (Ga. L. 1956, p. 161, § 26.)

#### 42-5-34. Powers of arrest of wardens, superintendents, and deputies.

Wardens and superintendents shall have authority to deputize any person in their employ. Wardens, superintendents, and their deputies are legally constituted arresting officers, with or without warrants, for the purpose of arresting persons violating Code Sections 42-5-14 through 42-5-18. Any person resisting arrest shall be dealt with as the law directs for resisting an officer. (Ga. L. 1961, p. 45, § 1; Ga. L. 1986, p. 1170, § 1.)

## JUDICIAL DECISIONS

**Cited in** *State v. Roulain*, 159 Ga. App. 233, 283 S.E.2d 89 (1981).

#### 42-5-35. Conferral of police powers; authorization to assist local law enforcement officers or correctional officers.

(a) The commissioner may confer all powers of a police officer of this state, including, but not limited to, the power to make summary arrests for violations of any of the criminal laws of this state and the power to carry weapons, upon wardens of county correctional institutions and upon persons in the commissioner's employment as the commissioner deems necessary, provided that individuals so designated meet the requirements specified in all applicable laws.

(b) The commissioner or his designee may authorize certain persons in his employment to assist law enforcement officers or correctional officers of

local governments in preserving order and peace when so requested by such local authorities. (Ga. L. 1956, p. 161, § 19; Ga. L. 1972, p. 599, § 1; Ga. L. 1975, p. 1246, § 1; Ga. L. 1983, p. 672, § 1; Ga. L. 1984, p. 22, § 42; Ga. L. 1986, p. 1170, § 2; Ga. L. 1987, p. 454, § 1; Ga. L. 1988, p. 464, § 1.)

### JUDICIAL DECISIONS

**Cited** in *State v. Roulain*, 159 Ga. App. 233, 283 S.E.2d 89 (1981).

### OPINIONS OF THE ATTORNEY GENERAL

**Officer's actions in preventing escape** must be with sole intent of discharging duty to prevent escape and arrest inmate. Any other intent on officer's part will eliminate his defense of justification. 1981 Op. Att'y Gen. No. 81-82.

**Extent of force permissible in preventing inmate escapes.** — See 1981 Op. Att'y Gen. No. 81-82.

### **42-5-36. Confidentiality of information supplied by inmates; penalties for breach thereof; classified nature of department investigation reports; custodians of records of department.**

(a) Officials and employees of the department shall respect the confidential nature of information supplied by inmates who cooperate in remedying abuses and wrongdoing in the penal system. Any official or employee who breaks such a confidence and thereby subjects a cooperating inmate to physical jeopardy or harassment shall be subject to suspension or discharge.

(b) Investigation reports and intelligence data prepared by the Internal Investigations Unit of the department shall be classified as confidential state secrets and privileged under law, unless declassified in writing by the commissioner.

(c) All institutional inmate files and central office inmate files of the department shall be classified as confidential state secrets and privileged under law, unless declassified in writing by the commissioner; provided, however, these records shall be subject to subpoena by a court of competent jurisdiction of this state.

(d) The commissioner shall designate members of the department to be the official custodians of the records of the department. The custodians may certify copies or compilations, including extracts thereof, of the records of the department. Subject to the provisions of this Code section, in response to a subpoena or upon the request of any appropriate government or judicial official, the department may provide a duly authenticated copy of any record or other document. This authenticated copy may consist of a photocopy or computer printout of the requested document certified by

the commissioner or his or her duly authorized representative. (Ga. L. 1968, p. 1399, § 5; Ga. L. 1983, p. 680, § 1; Ga. L. 1984, p. 22, § 42; Ga. L. 1984, p. 1361, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 1997, p. 851, § 1.)

**The 1997 amendment**, effective April 21, 1997, added subsection (d).

**Cross references.** — Privileged communi-

cations generally, § 24-9-20 et seq. Inspection of public records generally, § 50-18-70 et seq.

### OPINIONS OF THE ATTORNEY GENERAL

**Declassification by commissioner.** — Pursuant to this section, investigation reports and intelligence data prepared by the Internal Investigations Unit of the Department of Offender Rehabilitation (Corrections) are

classified as confidential state secrets and privileged under law except as declassified in writing by the commissioner of offender rehabilitation (corrections). 1985 Op. Att'y Gen. No. 85-4.

### 42-5-37. Employees in control of inmates prohibited from receiving profit from inmate labor; penalties.

(a) No warden, superintendent, deputy, inspector, physician, or any officer or other employee who has charge, control, or direction of inmates shall be interested in any manner whatever in the work or profit of the labor of any inmate; nor shall any such personnel receive any pay, gift, gratuity, or favor of a valuable character from any person interested, either directly or indirectly, in such labor.

(b) Any person violating subsection (a) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for a term of not less than two years and not more than five years. The offense may be reduced to a misdemeanor by recommendation of the jury trying the case, if the court concurs in the jury's recommendation. In addition, a person who violates subsection (a) of this Code section shall be summarily discharged from the service of the state by the department.

(c) This Code section shall not prohibit a part-time professional employee from the regular practice of his profession. (Ga. L. 1908, p. 1119, § 11; Penal Code 1910, § 1196; Code 1933, § 77-9906; Ga. L. 1984, p. 639, § 3.)

### JUDICIAL DECISIONS

**Constitutionality of subsection (a).** — While it is commonly understood that a warden will have a permissible interest in the performance of labor by inmates under his control as that labor benefits the county or state, the clear meaning of this statute is that a warden may not receive a personal interest

or benefit from the labor of inmates under his control. Therefore subsection (a) is not void for vagueness. *Cleveland v. State*, 260 Ga. 770, 399 S.E.2d 472 (1991).

**Warden's use of inmate labor for personal benefit.** — Although, as warden, the defendant was permitted to live rent-free in a



house located on county property, the county did not benefit from routine use of inmates to perform personal housekeeping chores at this home, as well as to walk the warden's dogs and clean the dog pens, baby-sit his children, and wash his personal vehicles. Inmates who refused to perform these chores were punished. The extensive

evidence that the warden directed inmates to perform labor for his personal benefit supports his convictions for violating subsection (a) beyond a reasonable doubt. *Cleveland v. State*, 260 Ga. 770, 399 S.E.2d 472 (1991).

Cited in *Smith v. Deering*, 880 F. Supp. 816 (S.D. Ga. 1994).

**42-5-37.1. Compensation of employees of institutions operated by department for damages to wearing apparel caused by inmate action.**

(a) As used in this Code section, the term "wearing apparel" means eyeglasses, hearing aids, clothing, and similar items worn on the person of the employee.

(b) When action by an inmate in one of the penal institutions operated by the department results in damage to an item of wearing apparel of an employee of the institution, the department shall compensate the employee for the loss in the amount of the repair cost, the replacement value, or the cost of the item of wearing apparel, whichever is less.

(c) Such losses shall be compensated only in accordance with procedures to be established by the department. (Ga. L. 1981, p. 1429, § 1.)

**42-5-38. Making false statement as to age to procure employment.**

Any person who makes a false statement as to his age in order to procure employment as a correctional officer, warden, superintendent, or other employee shall be guilty of a misdemeanor. (Ga. L. 1908, p. 1119, § 10; Penal Code 1910, § 1193; Code 1933, § 77-9905.)

**42-5-39. Refusal by officer to receive inmates in correctional institution.**

If the superintendent or warden of a state or county correctional institution or other officer or person employed therein whose duty it is to receive inmates fails or refuses to do so, he shall be punished by confinement not exceeding ten years and shall be dismissed from office. (Cobb's 1851 Digest, p. 807; Code 1863, § 4381; Code 1868, § 4419; Code 1873, § 4487; Code 1882, § 4487; Penal Code 1895, § 286; Penal Code 1910, § 290; Code 1933, § 77-9903.)

**42-5-40. Requiring inmates to do unnecessary work on Sunday.**

Any superintendent, warden, or other correctional official who causes any inmate to do any work on Sunday, except works of necessity, shall be guilty of a misdemeanor. (Ga. L. 1908, p. 1119, § 14; Penal Code 1910,

§ 420; Code 1933, § 26-6909; Code 1933, § 26-9909, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For comment criticizing judicial intervention in *Brown v. Teel*, 236 A.2d 699 (N.H. 1967), and advocating deference to legislative determination of Sunday business law, see 19 Mercer L. Rev. 445 (1968). For comment on *Hughes v. Reynolds*, 223 Ga. 727, 157 S.E.2d 746 (1967), holding the Sunday Business Activities Act of 1967 (Code 1933, Ch. 96-8) unconstitutional, see 19 Mercer L. Rev. 479 (1968).

RESEARCH REFERENCES

**ALR.** — Validity, construction, and effect of "Sunday closing" or "blue" laws — modern status, 10 ALR4th 246.

42-5-41. Compensation of department employee injured by inmate or probationer.

Repealed by Ga. L. 1986, p. 1491, § 2, effective July 1, 1986.

**Editor's notes.** — This Code section was based on Ga. L. 1985, p. 1113, § 1. For current provisions regarding compensation of department employees injured in the line of duty by an act of external violence, see Code Section 45-7-9.

ARTICLE 3

CONDITIONS OF DETENTION GENERALLY

**Administrative rules and regulations.** — State of Georgia, Rules of Georgia Board of Institutional and center operations, Official Offender Rehabilitation, Chapters 415-3-1 Compilation of Rules and Regulations of through 415-3-6.

RESEARCH REFERENCES

**ALR.** — Sex discrimination in treatment of jail or prison inmates, 12 ALR4th 1219. familial visits in penal or correctional institutions, 29 ALR4th 1216.  
State regulation of conjugal or overnight

42-5-50. Transmittal of information on convicted persons; place of detention; custody of inmates sentenced prior to January 1, 1983.

(a) The clerk of the court shall notify the commissioner of a sentence within 30 working days following the receipt of the sentence, and other documents set forth in this Code section. Such notice shall be mailed within such time period by first-class mail and shall be accompanied by three complete and certified sentence packages containing the following documents:

- (1) A certified copy of the sentence;

(2) A complete history of the convicted person, including a certified copy of the indictment, accusation, or both and such other information as the commissioner may require;

(3) An affidavit of the custodian of such person indicating the total number of days the convicted person was incarcerated prior to the imposition of the sentence. It shall be the duty of the custodian of such person to transmit the affidavit provided for in this paragraph to the clerk of the superior court within ten days following the date on which the sentence is imposed; and

(4) Order of probation revocation or tolling of probation.

All of the aforementioned documents will be submitted on forms provided by the commissioner. The commissioner shall file one copy of each such document with the State Board of Pardons and Paroles within 30 working days of receipt of such documents from the clerk of the court. Except where the clerk is on a salary, the clerk shall receive from funds of the county the fee prescribed in Code Section 15-6-77 for such service.

(b) Except as otherwise provided in subsection (c) of this Code section, within 15 days after the receipt of the information provided for in subsection (a) of this Code section, the commissioner shall assign the convicted person to a correctional institution designated by him in accordance with subsection (b) of Code Section 42-5-51. It shall be the financial responsibility of the correctional institution to provide for the picking up and transportation, under guard, of the inmate to his assigned place of detention. If the inmate is assigned to a county correctional institution or other county facility, the county shall assume such duty and responsibility.

(c) In the event that the attorney for the convicted person shall file a written request with the court setting forth that the presence of the convicted person is required within the county of the conviction, or incarceration, in order to prepare and prosecute properly the appeal of the conviction, the convicted person shall not be transferred to the correctional institution as provided in subsection (b) of this Code section. In such event the convicted person shall remain in the custody of the local jail or lockup until all appeals of the conviction shall be disposed of or until the attorney of record for the convicted person shall file with the trial court an affidavit setting forth that the presence of the convicted person is no longer required within the county in which the conviction occurred, or in which the convicted person is incarcerated, whichever event shall first occur.

(d) The department shall not be required to assume the custody of those inmates who have been convicted and sentenced prior to January 1, 1983, and because their conviction is under appeal have not been transferred to the custody of the department, until July 1, 1983. The state shall pay for each such inmate not transferred to the custody of the department the per diem rate specified by subsection (c) of Code Section 42-5-51 for each day



the inmate remains in the custody of the county after the department receives the notice provided by subsection (a) of this Code section on or after January 1, 1983.

(e) In the event that the convicted person is free on bond pending the appeal of his conviction, the notice provided for in subsection (a) of this Code section shall not be transmitted to the commissioner until all appeals of such conviction have been disposed of or until the bond shall be revoked. (Ga. L. 1956, p. 161, § 13; Ga. L. 1968, p. 1399, § 1; Ga. L. 1977, p. 1098, § 9; Ga. L. 1982, p. 1364, § 1; Ga. L. 1983, p. 3, § 31; Ga. L. 1985, p. 149, § 42; Ga. L. 1990, p. 565, § 1; Ga. L. 1991, p. 94, § 42.)

**Cross references.** — Imposition of sentence generally, § 17-10-1.

### JUDICIAL DECISIONS

**Language in sentence designating place of incarceration surplusage but not void.** — Where one guilty of a misdemeanor is sentenced to be "confined at labor at the State Penitentiary at Reidsville, Georgia (Georgia State Prison), or such other place as the proper authority may direct," such portion of the sentence as seeks to designate the place of confinement, where no effort so to confine the prisoner is shown and since the director of the department of corrections (now commissioner of corrections) designates where most sentences are served, is mere surplusage, and, though technically not in the right form, is not such an irregularity as is hurtful to any right of liberty, or such a defect as makes the sentence void. *Mathis v. Scott*, 199 Ga. 743, 35 S.E.2d 285 (1945) (decided under Ga. L. 1937, p. 758).

**Absent evidence of defendant's inducement guilty plea not void.** — Defendant's dissatisfaction as to his incarceration in an

institution other than one recommended by the court does not render his guilty plea void where there is no evidence that it constituted a part of the inducement to enter the plea. *Overby v. State*, 150 Ga. App. 319, 257 S.E.2d 386 (1979).

**Finality of board's decisions.** — Board controls prison system and its administrative decisions are final absent violation of rights enforceable in the courts; thus, enumeration of error is waived where defendant admits that the trial court and the district attorney kept their part of the agreement. *Overby v. State*, 150 Ga. App. 319, 257 S.E.2d 386 (1979).

**Cited in** *Ricketts v. Brantley*, 239 Ga. 151, 236 S.E.2d 51 (1977); *Wise v. Balkcom*, 245 Ga. 126, 263 S.E.2d 158 (1980); *Whiddon v. State*, 160 Ga. App. 777, 287 S.E.2d 114 (1982); *Welch v. State*, 172 Ga. App. 654, 324 S.E.2d 488 (1984).

### OPINIONS OF THE ATTORNEY GENERAL

**Felons must serve sentence under department's custody.** — Since all convicted felons sentenced to a term of incarceration now serve their sentences under the jurisdiction of the department, judges of the superior courts lack the authority to sentence an inmate to the custody of any other person or entity. 1993 Op. Att'y Gen. No. 93-17.

**Pending appeal, department cannot take custody of prisoner.** — The department cannot, without a valid request from the

prisoner or his attorney, take custody of a prisoner whose motion for new trial has been denied and whose attorney has stated that he will file an appeal within the required 30 days, so long as this time has not expired. 1973 Op. Att'y Gen. No. 73-153.

**Finality of convictions.** — During the 30-day period in which an appeal may be filed, a conviction is not final within the meaning of subsection (a) of this section; accordingly, unless there has been a valid

request for transfer, the department cannot assume lawful custody of the prisoner. 1973 Op. Att'y Gen. No. 73-153 (rendered prior to 1983 amendment).

**Restrictions as to incarceration in board-operated institution.** — An individual awaiting disposition of a pending criminal charge and who is not serving a sentence in the state correctional system may not be incarcerated in an institution operated by the Board of Corrections. 1970 Op. Att'y Gen. No. 70-111.

**Summons in lieu of indictment or accusation.** — Where an inmate has been brought to trial and convicted upon a summons, rather than an indictment or an accusation, the clerk of the court in which the conviction was returned must furnish to the Department of Offender Rehabilitation (Corrections) a certified copy of that summons; in such cases, the certified copy of the summons stands in lieu of an indictment or accusation. 1969 Op. Att'y Gen. No. 69-517.

**Lost indictment.** — Clerk's certification that indictment is lost is not sufficient replacement for a certified copy of the actual indictment. 1970 Op. Att'y Gen. No. 70-61.

Because the General Assembly contemplated receipt of the document specifying the charge of which the inmate had been found guilty, a clerk's certification that the indictment is lost is not sufficient replacement for a certified copy of the actual indictment. 1969 Op. Att'y Gen. No. 69-517.

**Whether punishment computed on basis of felony or misdemeanor.** — Whether punishment is computed on the basis of a felony or a misdemeanor sentence is controlled by the conviction; a prisoner is either a misdemeanant or a felon, dependent on the crime for which he was convicted. 1970 Op. Att'y Gen. No. 70-49.

When sentence contains reduction of an offense from felony to misdemeanor, sentence should be computed as a misdemeanor because those authorized to fix the sentence have elected to so treat it. 1970 Op. Att'y Gen. No. 70-49.

**A sentence does not have a shifting quality,** allowing it to vacillate between misde-

meanor and felony status at different times or for different purposes. 1970 Op. Att'y Gen. No. 70-49.

**Presumption of validity of sentence.** — When the director of corrections (now commissioner of corrections) receives the certificate of the clerk of the sentencing court, the presumption is that the sentence imposed is a valid sentence. 1977 Op. Att'y Gen. No. 77-71.

**Board prescribes conditions of work required of prisoners.** — In view of the broad language found in subsection (e) of § 42-5-60 that prison labor could be required in public buildings in any such manner as deemed advisable by the Board of Offender Rehabilitation (Corrections), it is obvious that the legislature intended the board to prescribe the conditions of work required of the prisoners; and even though some of the prisoners are physically restrained for overnight periods in county jails, their primary assignment is nonetheless to the prison or public work camp (now county correctional institution) as determined by the commissioner; in turn the prison or camp has sole administrative responsibility and control of the prisoner even though he may be temporarily attached to the county jail to perform the required repair or maintenance services; such a temporary attachment is not an assignment which contravenes the language of this section. 1963-65 Op. Att'y Gen. p. 72.

**Data on inmates' jail time prior to trial.** — The director of corrections (now commissioner of corrections) is authorized to devise and distribute such forms as may be necessary to implement §§ 17-10-11 and 17-10-12 (relating to time spent in confinement awaiting trial); the director may require that data concerning the number of days an inmate spent in jail prior to trial be transmitted to the Board of Corrections upon forms approved and distributed by the board. 1970 Op. Att'y Gen. No. 70-127.

**Vehicles to transport prisoners.** — There are no specific requirements as to types of vehicles which may be used to transport prisoners. 1962 Op. Att'y Gen. p. 382.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 34, 154.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 20-26, 130, 131.

ALR. — Validity of statute empowering tertiary inmate of reformatory, 95 ALR administrative officials to transfer to peni- 1455.

**42-5-51. Jurisdiction over certain misdemeanor offenders; designation of place of confinement of inmates; reimbursement of county; transfer of inmates to federal authority.**

(a) The department shall have no authority, jurisdiction, or responsibility with respect to misdemeanor offenders sentenced under paragraph (1) of subsection (a) of Code Section 17-10-3 to confinement in the county or other jail, county correctional institution, or such other places as counties may provide for maintenance of county inmates. The county wherein the sentence is imposed shall have the sole responsibility of executing the sentence and of providing for the care, maintenance, and upkeep of the inmate while serving such sentence; provided, however, that, where the sentencing judge certifies to the department that the county facilities of that county are inadequate for maintaining female inmates, any female inmate may be committed to the department to serve her sentence in a state correctional institution, as may be directed by the department; provided, further, that the delivery of the female inmates to the proper place of incarceration shall be at the expense of the county of conviction.

(b) Where any person is convicted of any offense, misdemeanor, or felony and sentenced to serve time in any penal institution in this state other than as provided in subsection (a) of this Code section, he shall be committed to the custody of the commissioner who, with the approval of the board, shall designate the place of confinement where the sentence shall be served.

(c) After proper documentation is received from the clerk of the court, the department shall have 15 days to transfer an inmate under sentence to the place of confinement. If the inmate is not transferred within the 15 days, the department will reimburse the county, in a sum not less than \$7.50 per day per inmate and in such an amount as may be appropriated for this purpose by the General Assembly, for the cost of the incarceration, commencing 15 days after proper documentation is received by the department from the clerk of the court. The reimbursement provisions of this Code section shall only apply to payment for the incarceration of felony inmates available for transfer to the department, except inmates under death sentence awaiting transfer after their initial trial, and shall not apply to inmates who were incarcerated under the custody of the commissioner at the time they were returned to the county jail for trial on additional charges or returned to the county jail for any other purposes, including for the purpose of a new trial.

(d) Notwithstanding any language in the sentence as passed by the court, the commissioner may designate as a place of confinement any available, suitable, and appropriate state or county correctional institution in this



state operated under the jurisdiction or supervision of the department. The commissioner shall also have sole authority to transfer inmates from one state or county correctional institution in this state to any other such institution operated by or under the jurisdiction or supervision of or approved by the board. Neither male nor female state inmates shall be assigned to serve in any manner in a county jail unless they are participating in a state sponsored project and have the approval of the commissioner and the sheriff or the jail administrator of the county. Furthermore, the commissioner may transfer to the Attorney General of the United States for confinement any inmate if it is determined that the custody, care, treatment, training, or rehabilitation of the inmate has not been adequate or in the best interest of the inmate or his fellow inmates. The commissioner is authorized to contract with the Attorney General of the United States for the custody, care, subsistence, housing, treatment, training, and rehabilitation of such inmates. (Ga. L. 1956, p. 161, § 13; Ga. L. 1964, p. 489, § 2; Ga. L. 1968, p. 1399, § 1; Ga. L. 1972, p. 582, § 1; Ga. L. 1973, p. 1297, § 1; Ga. L. 1979, p. 376, § 1; Ga. L. 1981, p. 1434, § 1; Ga. L. 1982, p. 1364, § 2; Ga. L. 1984, p. 604, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1.)

**Law reviews.** — For article surveying legislative and judicial developments in Georgia

local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979).

### JUDICIAL DECISIONS

**The function of the prison commission** (now Board of Corrections) is to enforce sentences that are lawfully imposed, and the question as to whether a court is acting within its jurisdiction in modifying a sentence is in nowise affected by this section. *Gobles v. Hayes*, 194 Ga. 297, 21 S.E.2d 624 (1942) (decided under former Code 1933, § 77-313).

**Board of Corrections controls prison system** and its administrative decisions are final absent violation of rights enforceable in the courts; this enumeration of error is waived where defendant admits that the trial court and the district attorney have kept their part of the agreement. *Overby v. State*, 150 Ga. App. 319, 257 S.E.2d 386 (1979).

**Absent evidence of defendant's inducement guilty plea not void.** — Defendant's dissatisfaction as to his incarceration in an institution other than the one recommended by the court does not render his guilty plea void, where there is no evidence that it constituted a part of the inducement to enter the plea. *Overby v. State*, 150 Ga. App. 319, 257 S.E.2d 386 (1979).

**Language in sentence designating place of incarceration surplusage.** — Where one

guilty of a misdemeanor is sentenced to be "confined at labor at the State Penitentiary (Georgia State Prison) at Reidsville, Georgia, or such other place as the proper authority may direct," such portion of the sentence as seeks to designate the place of confinement, where no effort so to confine the prisoner is shown and since the director of the department of corrections (now commissioner of corrections) designates where most sentences are served, is mere surplusage, and, though technically not in the right form, is not such an irregularity as is hurtful to any right of liberty, or such a defect as makes the sentence void. *Mathis v. Scott*, 199 Ga. 743, 35 S.E.2d 285 (1945) (decided under Ga. L. 1937, p. 758).

**Superior court empowered to transfer habeas corpus petitioner.** — A superior court in this state has the power to order a habeas corpus petitioner under sentence of state court transferred from one penal institution to another, where this is necessary to grant the petitioner's constitutional right to meaningful access to the courts. To the extent that there exists a conflict between the statutory authority vested in the department to trans-

fer prisoners from one correctional institute to another, and the authority vested in the superior court to enforce the Constitution, the former must yield to the latter. *James v. Hight*, 251 Ga. 563, 307 S.E.2d 660 (1983).

**Cited in** *Wilkes County v. Arrendale*, 227 Ga. 289, 180 S.E.2d 548 (1971); *In re Pris-*

*oners Awaiting Transf.*, 236 Ga. 516, 224 S.E.2d 905 (1976); *McKenze v. State*, 140 Ga. App. 402, 231 S.E.2d 149 (1976); *Wise v. Balkcom*, 245 Ga. 126, 263 S.E.2d 158 (1980); *Whiddon v. State*, 160 Ga. App. 777, 287 S.E.2d 114 (1982); *Hawk v. Georgia Dep't of Cors.*, 44 F.3d 965 (11th Cir. 1995).

## OPINIONS OF THE ATTORNEY GENERAL

### ANALYSIS

#### GENERAL CONSIDERATION

##### CUSTODY OF PRISONERS

##### YOUTHFUL OFFENDERS

##### MISDEMEANANTS OR FELONS

### General Consideration

**Assignments to county correctional institutions.** — Only the director of corrections (now commissioner of corrections), with the approval of the Board of Corrections, may make assignments of state prisoners to county correctional institutions. 1975 Op. Att'y Gen. No. U75-93.

**Board prescribes conditions of work required of prisoners.** — In view of the broad language found in subsection (e) of § 42-5-60 that prison labor could be required in public buildings in any such manner as deemed advisable by the Board of Corrections, it is obvious that the legislature intended the board to prescribe the conditions of work required of the prisoners; and even though some of the prisoners are physically restrained for overnight periods in county jails, their primary assignment is nonetheless to the prison or public work camp (now county correctional institution) as determined by the commissioner; in turn the prison or camp has sole administrative responsibility and control of the prisoner even though he may be temporarily attached to the county jail to perform the required repair or maintenance services; such a temporary attachment is not an assignment which contravenes the language of this section. 1963-65 Op. Att'y Gen. p. 72.

**Employment of inmates not prohibited.** — There is no provision in the law to prohibit employment for most inmates, as long as the requirements of this section are met. 1980 Op. Att'y Gen. No. 80-44.

**Part-time employment of "maintenance" inmates.** — If a program is implemented

allowing "maintenance" inmates to have part-time jobs, it must fit all of the requirements of this section. 1980 Op. Att'y Gen. No. 80-44.

Though a program for part-time employment by "maintenance" inmates by center personnel could be developed under this section for "maintenance" inmates, it would be unwise. 1980 Op. Att'y Gen. No. 80-44.

**Presumption of validity of sentence.** — When the director of corrections (now commissioner of corrections) receives the certificate of the clerk of the sentencing court, the presumption is that the sentence imposed is a valid sentence. 1977 Op. Att'y Gen. No. 77-71.

**Incarceration of federal prisoners in penal system.** — The Board of Corrections may not enter into a contract with the bureau of prisons for the incarceration of a federal prisoner in the penal system of this state. 1968 Op. Att'y Gen. No. 68-86.

**Contracting with private consulting firm for operation of prerelease center.** — Board cannot contract with a private consulting firm for operation of a prerelease center; even if such power existed, the director of corrections (now commissioner of corrections) does not have the authority to assign inmates committed to the custody of the board to such a private institution. 1973 Op. Att'y Gen. No. 73-72.

**Requests from county probation department for retention of custody of inmate pending arrival of deputy sheriff or probation officer must be disregarded by the wardens.** 1969 Op. Att'y Gen. No. 69-151.

**Commitment of prisoners to county correctional institution by recorder's court.** — A



recorder's court would have the authority to commit an individual to a county public works camp (now county correctional institution) which operates under the jurisdiction of the Board of Corrections, provided that the city prisoners committed are not required to work on the county public works camp (now county correctional institution); that they are otherwise separated from county prisoners convicted of state felonies and misdemeanors; and that the receiving county is compensated for the board and upkeep of such city prisoners. 1968 Op. Att'y Gen. No. 68-175.

**Vehicles to transport prisoners.** — There are no specific requirements as to types of vehicles which may be used to transport prisoners. 1962 Op. Att'y Gen. p. 382.

### Custody of Prisoners

**Felons must serve sentence under department's custody.** — Since all convicted felons sentenced to a term of incarceration now serve their sentences under the jurisdiction of the department, judges of the superior courts lack the authority to sentence an inmate to the custody of any other person or entity. 1993 Op. Att'y Gen. No. 93-17.

**The obligation of department to accept prisoner into state penal system** arises only upon (1) "sentencing" of prisoner to actually serve time in state institution and (2) receipt by department of proper documentation of sentence by clerk of court. 1982 Op. Att'y Gen. No. 82-33.

Upon revocation of parole and the sentencing to serve time in a penal institution, the state has an obligation to accept such persons into the state penal system. 1982 Op. Att'y Gen. No. 82-33.

**Pending appeal department cannot take custody of prisoner.** — The Department of Corrections cannot, without a valid request from the prisoner or his attorney, take custody of a prisoner whose motion for new trial has been denied and whose attorney has stated that he will file an appeal within the required 30 days, so long as this time has not expired. 1973 Op. Att'y Gen. No. 73-153 (rendered prior to 1982 amendment).

**Finality of conviction.** — During the 30-day period in which an appeal may be filed, a conviction is not final within the meaning of subsection (a) of § 42-5-50; accordingly, unless there has been a valid

request for transfer, the Department of Corrections cannot assume lawful custody of the prisoner. 1973 Op. Att'y Gen. No. 73-153 (rendered prior to 1982 amendment).

**Restrictions as to incarceration in board-operated institution.** — An individual awaiting disposition of a pending criminal charge and who is not serving a sentence in the state correctional system may not be incarcerated in an institution operated by the Board of Corrections. 1970 Op. Att'y Gen. No. 70-111.

**Custody of prisoners sentenced to death.** — The supervening events described by § 17-10-33 do not include filing motion for new trial so that such nonfinality of conviction which, by the terms of subsection (a) of § 42-5-50, precludes acceptance of custody of prisoners "sentenced to serve time" (subsection (b) of this section), does not in the case of prisoners sentenced to be executed, preclude acceptance of custody; the procedure of retention of convicted prisoners in the county jails until their convictions have become final, as provided in subsection (a) of § 42-5-50, does not apply to persons sentenced to death, because (1) they are not "sentenced to serve time" (subsection (b) of this section) and therefore do not have "such a sentence," in the words of subsection (a) of § 42-5-50, and, (2) § 17-10-33 specifically requires the sheriff to convey them to the penitentiary unless (a) the Governor directs otherwise, or (b) a stay has been caused by appeal, or (c) a new trial has been granted, or (d) a court orders otherwise. 1971 Op. Att'y Gen. No. 71-188.

### Youthful Offenders

**Board designated sole agency for reception and assignment.** — As a general rule, the legislature has designated the Board of Offender Rehabilitation (Corrections) sole agency for reception and assignment of convicted misdemeanants and felons. Notable exceptions to this general provision concern individuals convicted of misdemeanors who, under certain conditions, must be placed in a county institution and, under other conditions, may be placed in such facilities in the discretion of the trial court; and one notable exception provides that the Division for Children and Youth is designated the exclusive state agency for the acceptance and incarceration of all misdemeanants and felons under



**Youthful Offenders (Cont'd)**

the age of 17 years; provided, however, that those felons convicted of a capital felony shall only be sentenced into the custody of the Department of Offender Rehabilitation (Corrections). 1972 Op. Att'y Gen. No. 72-3.

**Restriction and discretion on releasing and assigning youthful offenders.** — When a combination of youthful offender and standard sentences occur, the Youthful Offender Division may not approve a conditional or unconditional release for the described youthful offender until his concurrent standard sentence has expired; nevertheless, he could be assigned to an institution maintained primarily for youthful offenders during the entire period for which the board is charged with custody over him, since Ga. L. 1956, p. 161 (see § 42-5-50(b) and subsections (b) and (d) of this section) empowers the board to assign inmates to any institution within its system, and § 42-7-8 authorizes the director of corrections (now commissioner of corrections) to segregate youthful offenders from other prisoners. 1973 Op. Att'y Gen. No. 73-82.

**Defined class of offenders set out.** — Former paragraph (5) of subsection (a) of § 49-5-7 set apart a defined class of offenders and directed how they were to be punished for the offense; in doing this, the power of any superior court to try an individual under the age of 17 for any given crime was in no way affected; in this respect, § 49-5-7 was like this section which provides that the commissioner of corrections and not the sentencing court designates the place of confinement of any individual within its jurisdiction. 1972 Op. Att'y Gen. No. 72-3.

**Misdemeanants or Felons**

**Whether punishment computed on basis of felony or misdemeanor.** — Whether punishment is computed on the basis of a felony or a misdemeanor sentence is controlled by the conviction; a prisoner is either a misdemeanor or a felon, dependent on the crime for which he was convicted. 1970 Op. Att'y Gen. No. 70-49.

When sentence contains reduction of an offense from felony to misdemeanor, sentence should be computed as a misdemeanor because those authorized to fix the sentence have elected to so treat it. 1970 Op. Att'y Gen. No. 70-49.

**Language in sentence designating place of incarceration.** — All felons and misdemeanants, other than those misdemeanants committed directly to a county public works camp (now county correctional institution), must be committed directly and exclusively to the Board of Corrections; only the director of corrections (now commissioner of corrections) is authorized to prescribe the place of confinement; so much of the language of a sentence committing an inmate to a term of penal servitude in the state prison system as purports to commit the inmate to Central State Hospital is surplusage and should not be relied upon by the officials of the hospital or the Board of Corrections as authority for the retention of custody of the inmate at the hospital. 1970 Op. Att'y Gen. No. 70-133.

**Receipt of prisoners from mayor's court.** — Board has authority to receive misdemeanor prisoners from a mayor's court of a municipality where there is no city or county court in that county. 1954-56 Op. Att'y Gen. p. 529.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 8, 9, 11, 13, 34, 150, 154.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 20-26, 130, 131, 136.

**ALR.** — Validity of statute empowering administrative officials to transfer to penitentiary inmate of reformatory, 95 ALR 1455.

Validity, construction, and application of

statutory provision for reimbursement of state (or subdivision thereof) for expense of keeping prisoner, 139 ALR 1028.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine, 50 ALR3d 397.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 ALR4th 773.

Right of incarcerated mother to retain custody of infant in penal institution, 14 ALR4th 748.

state statute requiring inmate to reimburse government for expense of incarceration, 13 ALR5th 872.

Validity, construction, and application of

**42-5-52. Classification and separation of inmates generally; placement of juvenile offenders and of females; transfer of mentally diseased, alcoholic, drug addicted, or tubercular inmates.**

(a) The department shall provide for the classification and separation of inmates with respect to age, first offenders, habitual criminals and incorrigibles, diseased inmates, mentally diseased inmates, and those having contagious, infectious, and incurable diseases. Incorrigible inmates in county correctional institutions shall be returned to the department at the request of the proper county authority.

(b) The department may establish separate correctional or similar institutions for the separation and care of juvenile offenders. The commissioner may transfer any juvenile under 17 years of age from the penal institution in which he is serving to the Department of Juvenile Justice, provided that the transfer is approved thereby. The juvenile may be returned to the custody of the commissioner when the commissioner of juvenile justice determines that the juvenile is unsuited to be dealt with therein.

(c) Female inmates shall be removed from proximity to the place of detention for males and shall not be confined in a county correctional institution or other county facility except with the express written approval of the department.

(d) The department is authorized to transfer a mentally diseased inmate from a state or county correctional institution or other facility operating under its authority to a criminal ward or facility of the Department of Human Resources. The inmate shall remain in the custody of the Department of Human Resources until proper officials of the facility at which he is detained declare that his sanity has been restored, at which time the inmate shall be returned to the custody of the department. At any time after completion of his sentence, an inmate detained by the Department of Human Resources on the grounds that he is mentally diseased may petition for release in accordance with the procedure provided in Chapter 3 of Title 37. Prior to completion of his sentence, this procedure shall not be available to him.

(e) Upon being presented with a proper certification from the county physician of a county where a person has been sentenced to confinement that the person sentenced is addicted to drugs or alcohol to the extent that his health will be impaired or his life endangered if immediate treatment is not rendered, the department shall transfer the inmate to the custody of the Department of Human Resources. The inmate shall remain in such custody

until officials of the Department of Human Resources determine he is able to serve his sentence elsewhere.

(f) The department may transfer any inmate afflicted with active tuberculosis from any state or county correctional institution, or any other facility operating under the authority of the department, to a tubercular ward or facility specially provided and maintained for criminals by the department at a tuberculosis facility or facilities operating under the Department of Human Resources. (Ga. L. 1897, p. 71, § 8; Penal Code 1910, § 1203; Ga. L. 1931, Ex. Sess., p. 118, §§ 8, 9; Code 1933, §§ 77-317, 77-318, 77-319; Ga. L. 1956, p. 161, § 14; Ga. L. 1957, p. 477, § 2; Ga. L. 1960, p. 234, § 1; Ga. L. 1962, p. 699, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 1992, p. 1983, § 21; Ga. L. 1997, p. 1453, §§ 1, 2.)

**The 1997 amendment**, effective July 1, 1997, in subsection (b), substituted "Department of Juvenile Justice" for "Department of Children and Youth Services" in the second sentence and substituted "commissioner of juvenile justice" for "commissioner of children and youth services" in the third sentence.

**Cross references.** — Provision that a child

shall not be committed to penal institution or other facility used primarily for execution of sentences of persons convicted of crime, § 15-11-38.

**Law reviews.** — For note, "Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia," see 8 Ga. L. Rev. 919 (1974).

## JUDICIAL DECISIONS

**Confinement of drug addict not cruel and unusual punishment.** — Where defendant's physician certified that she was a drug addict and withdrawal from drugs was inadvisable, a sentence of 12 months and a fine of \$500.00 was not cruel and unusual punishment in light of subsection (e) of this section.

Trammell v. State, 125 Ga. App. 39, 186 S.E.2d 438 (1971).

**Cited in** Irwin v. Arrendale, 117 Ga. App. 1, 159 S.E.2d 719 (1967); Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968); Wilkes County v. Arrendale, 227 Ga. 289, 180 S.E.2d 548 (1971).

## OPINIONS OF THE ATTORNEY GENERAL

**Transfer of inmate to mental hospital.** — The Board of Corrections can transfer an inmate to Central State Hospital for treatment as a mentally diseased inmate; if he is declared sane prior to completion of his existing sentence, he can be returned to stand trial for outstanding charges. 1970 Op. Att'y Gen. No. 70-72.

Subsections (a) and (c) of this section, §§ 42-2-8 and 42-2-9, indicate that the director of the Board of Corrections (now commissioner of corrections) is authorized to determine whether or not an inmate is mentally diseased and should be transferred to a state mental hospital. 1968 Op. Att'y Gen. No. 68-136.

**Retention of administrative control over**

**transferred prisoners.** — By implication from the language of this section, the Board of Corrections retains a certain amount of administrative control over a prisoner transferred to the criminal facilities at Central State Hospital. 1975 Op. Att'y Gen. No. 75-146.

**Transfer to state hospital of alcoholic or drug addict prisoners.** — In order that an alcoholic or drug addict who is a prisoner be transferred to a state hospital, the county physician must certify that the health of the prisoner will be impaired or his life endangered unless treatment is received. 1962 Op. Att'y Gen. p. 381.

**Removal of alcoholic prisoner to other institution.** — Where prisoner certified to be



alcoholic and sent to a state hospital, he may be removed to another prison when hospital authorities determine he is able to serve sentence elsewhere. 1962 Op. Att'y Gen. p. 378.

**Good time allowances for mentally ill prisoners.** — Board of Corrections has the power to promulgate rules and regulations as to good time allowances which are applicable to prisoners transferred to Central State Hospital due to mental illness. 1975 Op. Att'y Gen. No. 75-146.

**Administration of shock treatment to prisoners.** — Convicted felons should and will only be given shock treatment at the Milledgeville State Hospital (now Central State Hospital) and then only when prescribed by a staff physician of that hospital. 1965-66 Op. Att'y Gen. No. 66-214.

**Responsibility for returning an insane fugitive convict** to the state is on the Department of Corrections. 1945-47 Op. Att'y Gen. p. 427 (decided under former Code 1933, § 77-401).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 34, 94, 95, 153.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 25, 26, 86, 87, 130, 131, 138.

**ALR.** — Constitutionality of statutes in relation to treatment or discipline of convicts, 50 ALR 104.

Liability of prison authorities for injury to

prisoner directly caused by assault by other prisoner, 41 ALR3d 1021.

Authority of court to order juvenile delinquent incarcerated in adult penal institution, 95 ALR3d 568.

Right of incarcerated mother to retain custody of infant in penal institution, 14 ALR4th 748.

### 42-5-52.1. Submission to HIV test; separate housing for HIV infected persons.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for that term in Code Section 31-22-9.1.

(b) Where any person is committed to the custody of the commissioner to serve time in any penal institution of this state on and after July 1, 1988, the department shall require that person to submit to an HIV test within 30 days after the person is so committed unless that person is in such custody because of having committed an AIDS transmitting crime and has already submitted to an HIV test pursuant to Code Section 17-10-15.

(c) No later than December 31, 1991, the department shall require to submit to an HIV test each person who has been committed to the custody of the commissioner to serve time in a penal institution of this state and who remains in such custody, or who would be in such custody but for having been transferred to the custody of the Department of Human Resources under Code Section 42-5-52, if that person has not submitted to an HIV test following that person's most recent commitment to the custody of the commissioner and unless that person is in such custody because of having committed an AIDS transmitting crime and has already submitted to an HIV test pursuant to Code Section 17-10-15.

(d) Upon failure of an inmate to cooperate in HIV test procedures under this Code section, the commissioner may apply to the superior court

for an order authorizing the use of such measures as are reasonably necessary to require submission to the HIV test. Nothing in this Code section shall be construed to limit the authority of the department to require inmates to submit to an HIV test.

(e) Any person determined by the department to be an HIV infected person, whether or not by the test required by this Code section, should be housed separately at existing institutions from any other persons not infected with HIV if:

(1) That person is reasonably believed to be sexually active while incarcerated;

(2) That person is reasonably believed to be sexually predatory either during or prior to incarceration; or

(3) The commissioner determines that other conditions or circumstances exist indicating that separate confinement would be in the best interest of the department and the inmate population,

but neither the department nor any officials, employees, or agents thereof shall be civilly or criminally liable for failing or refusing to house HIV infected persons separately from any other persons who are not HIV infected persons. (Code 1981, § 42-5-52.1, enacted by Ga. L. 1988, p. 1799, § 9.)

**Editor's notes.** — Ga. L. 1988, p. 1799, § 1, provides: "The General Assembly finds that Acquired Immunodeficiency Syndrome (AIDS) and its causative agent, including Human Immunodeficiency Virus (HIV), pose a grave threat to the health, safety, and welfare of the people of this state. In the absence of any effective vaccination or treatment for this disease, it threatens almost certain death to all who contract it. The disease is largely transmitted through sexual contacts and intravenous drug use, not through casual contact, and, while deadly, is therefore preventable. The key component of the fight against AIDS is education. Through public education and counseling

our citizens can learn how the disease is transmitted and, thus, how to protect themselves and prevent its spread. The Department of Human Resources is encouraged to continue its efforts to educate all Georgians about the disease, its causative agent, and its means of transmission. In addition, voluntary testing should be encouraged for anyone who feels at risk of infection. While education, counseling, and voluntary testing are vital to the elimination of this epidemic, other measures are needed to protect the health of our citizens, and it is the intention of the General Assembly to enact such measures in the exercise of its police powers in order to deal with AIDS and HIV infection."

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 91, 154.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 80, 84, 85, 130, 138.

**42-5-53. Establishment of county correctional institutions; supervision by department; quota of inmates; funding; confinement and withdrawal of inmates.**

(a) Subject to the provisions stated in this Code section, any county may purchase, rent, establish, construct, and maintain a county correctional institution for the care and detention of all inmates assigned to it by the department. The county may contract with other counties relative to the joint care, upkeep, and working of the inmates in such counties. Each county may pay its pro rata share of such expenses by taxes assessed and levied as provided by law.

(b) All county correctional institutions established by the counties as provided in subsection (a) of this Code section shall be subject to supervision and control by the department, and the board shall promulgate rules and regulations governing the administration and operation thereof.

(c) (1) Each county establishing a county correctional institution which complies with the rules and requirements established by the board and which is approved by the board shall receive a quota of inmates in accordance with such methods of apportionment as may be established by the board.

(2) The department is authorized, pursuant to rules and regulations adopted by the board, to pay funds, in an amount appropriated by the General Assembly for the purposes specified in paragraph (1) of this subsection, for each state inmate assigned to a county correctional institution to the county operating the facility. The amount so paid shall be determined on the basis of an equal amount per day for each state inmate assigned to the county correctional institution.

(3) Each county is authorized to use the money paid to it pursuant to paragraph (2) of this subsection for the operation and maintenance of the county correctional institution or may use the money so paid to supplant county funds or previous levels of county funding for the county correctional institution. Following a full hearing, the board is given the authority to withhold payment or withdraw all inmates from any county correctional institution which does not at any time meet or comply with the rules, regulations, and requirements of the board or comply with its directions.

(d) In all cases in which an inmate is the sole responsibility of a county and the board has no authority, jurisdiction, or responsibility with respect to the sentence of the inmate, the county may confine the inmate in a county correctional institution established pursuant to this Code section. Counties without a county correctional institution may contract with counties having a county correctional institution to maintain the inmate.

(e) Nothing in this Code section shall be construed to prohibit the board from withdrawing inmates from any county correctional institution which



does not at any time comply with the rules and regulations of the board promulgated pursuant to Code Section 42-5-10 or from withdrawing inmates from any county correctional institution which does not at any time meet the requirements of the board or comply with its directives. For reasons other than the failure to comply with the rules, regulations, requirements, and directives, the board is authorized to withdraw all inmates under its jurisdiction from all county correctional institutions under the following conditions:

(1) That such withdrawal shall include all inmates under the jurisdiction of the board assigned to all county correctional institutions and that the withdrawal shall be completed within one year after the effective date of the beginning of the withdrawal;

(2) That all county correctional institutions shall be notified at least one year in advance of the effective date of the beginning of the withdrawal;

(3) That each county affected by the withdrawal shall have the option of selling or leasing its county correctional institution to the department, provided the State Institutions and Property Committee of the House of Representatives and the Corrections, Correctional Institutions and Property Committee of the Senate shall certify to the department that the facility is suitable for inmate housing and provided, further, that the sale price of the facility or the lease rental payments for the facility shall be determined by a board of three appraisers selected as follows:

(A) One to be selected by the department;

(B) One to be selected by the governing authority of the county;  
and

(C) The third to be selected by the other two appraisers;

(4) That each county affected by the withdrawal shall have 30 days from the date of the issuance of the notice required by paragraph (2) of this subsection to notify the department that the facility is to be sold to the department, the facility is to be leased to the department, or the county will keep and maintain the facility for its own use. If the department is not so notified within the time limitation, the department shall be under no obligation to lease or purchase the facility;

(5) That if the county elects to sell or lease the facility, the committees named in paragraph (3) of this subsection shall have 60 days from the time the department is notified of such decision in which to inspect the facility and make its recommendations and certification to the department;

(6) That if any such facility is leased by the department, the term of the lease, the requirements relative to the repair, maintenance, and improve-

ments of the facility by the county, and the requirements relative to the renewal of the lease shall be as agreed upon by the department and the governing authority of the county; and

(7) That the sales price or lease rental payments for each facility and the requirements relative to the lease contract when the facility is leased shall be determined within six months after the issuance of the notice of the effective date of the beginning of the withdrawal required by paragraph (2) of this subsection and that, if they are not determined within the time limitation, the department shall be under no obligation to lease or purchase the facility. (Ga. L. 1956, p. 161, § 16; Ga. L. 1964, p. 491, § 1; Ga. L. 1970, p. 318, § 1; Ga. L. 1975, p. 908, § 1; Ga. L. 1980, p. 470, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 1995, p. 10, § 42.)

**The 1995 amendment**, effective February 21, 1995, part of an Act to correct errors and omissions in the Code, substituted "Corrections, Correctional Institutions and Property" for "Corrections" near the middle of

paragraph (3) of subsection (e).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1989, a comma was deleted following "inmate housing and" in paragraph (3) of subsection (e).

### JUDICIAL DECISIONS

**Cited** in *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga. 1968); *Wilkes County v.*

*Arrendale*, 227 Ga. 289, 180 S.E.2d 548 (1971).

### OPINIONS OF THE ATTORNEY GENERAL

**Distinction between state and county prisoners continues.** — Sections 42-2-11 and 42-5-57 relate to "state prisoners" rather than "county prisoners"; the distinction between "state" and "county" prisoners continues in effect even though both may be confined in a county work camp (now county correctional institution). 1970 Op. Att'y Gen. No. U70-134.

**Removal of prisoners from county institutions for failure to hire qualified warden.** — If a county correctional institution fails to employ a warden who is duly qualified according to the requirements set forth by the board, the board may remove all the prisoners from that institution. 1973 Op. Att'y Gen. No. 73-41.

**County rental of correctional institution.** — This section expressly authorizes county to rent a public works camp (now county correctional institution), and does not require it to obtain fee simple title as do the policies applicable to property acquired and

institutions conducted by the state itself. 1958-59 Op. Att'y Gen. p. 254.

**Board's control over lease by county.** — But the terms of any lease, etc., are subject to approval and supervision of the Board of Corrections, and it is entirely a matter of policy for the board to determine as to whether a proposed lease is acceptable. 1958-59 Op. Att'y Gen. p. 254.

**Use of city prisoners in county correctional institutions precluded.** — Exceptions to the general category of prisoners set forth in subsection (a) of this section must be explicitly set forth in the statute, as was done for county prisoners in subsection (d) of this section; this would preclude the use of city prisoners in public works camps (now county correctional institutions). 1963-65 Op. Att'y Gen. p. 571.

**County public works camps** (now county correctional institutions) are not "detention facilities" (see § 42-4-30) and are to be regulated, as they have been in the past, by

the Board of Corrections. 1973 Op. Att'y  
Gen. No. 73-117.

### RESEARCH REFERENCES

**ALR.** — Institution for the punishment or alcoholics as enjoynable nuisance, 21 ALR3d  
rehabilitation of criminals, delinquents, or 1058.

#### **42-5-54. Information from inmates relating to medical insurance; provision and payment of medical treatment for inmates.**

(a) As used in this Code section, the term:

(1) "Detention facility" means a county correctional institution, workcamp, or other county detention facility used for the detention of persons convicted of a felony or a misdemeanor.

(2) "Inmate" means a person who is detained in a detention facility by reason of being convicted of a felony or a misdemeanor and who is insured under existing individual health insurance, group health insurance, or prepaid medical care coverage or is eligible for benefits under Article 7 of Chapter 4 of Title 49, the "Georgia Medical Assistance Act of 1977." Such term does not include any sentenced inmate who is the responsibility of the Department of Corrections.

(3) "Officer in charge" means the warden, captain, or superintendent having the supervision of any detention facility.

(b) The officer in charge or his or her designee may require an inmate to furnish the following information:

(1) The existence of any health insurance, group health plan, or prepaid medical care coverage under which the inmate is insured;

(2) The eligibility for benefits to which the inmate is entitled under Article 7 of Chapter 4 of Title 49, the "Georgia Medical Assistance Act of 1977";

(3) The name and address of the third-party payor; and

(4) The policy or other identifying number.

(c) The officer in charge will provide a sick, injured, or disabled inmate access to medical services and may arrange for the inmate's health insurance carrier to pay the health care provider for the medical services rendered.

(d) The liability for payment for medical care described under subsection (b) of this Code section may not be construed as requiring payment by any person or entity, except by an inmate personally or by his or her carrier through coverage or benefits described under paragraph (1) of subsection



(b) of this Code section or by or at the direction of the Department of Medical Assistance pursuant to paragraph (2) of such subsection.

(e) Nothing in this Code section shall be construed to relieve the governing authority, governmental unit, subdivision, or agency having the physical custody of an inmate from its responsibility to pay for any medical and hospital care rendered to such inmate regardless of whether such individual has been convicted of a crime. (Code 1981, § 42-5-54, enacted by Ga. L. 1996, p. 1081, § 3.)

**Effect of amendment.** — This Code section became effective July 1, 1996.

**Editor's notes.** — This former Code section, relating to temporary transfer of convicted persons pending appeals, was based on Ga. L. 1971, p. 341, § 2, and was repealed

by Ga. L. 1982, p. 1364, § 3 effective January 1, 1983.

**Law reviews.** — For review of 1996 legislation relating to jails, see 13 Ga. St. U. L. Rev. 269 and 273.

**42-5-55. Deductions from inmate accounts for payment of certain damages and medical costs; limit on deductions; fee for managing inmate accounts.**

(a) As used in this Code section, the term:

(1) "Detention facility" means a state or county correctional institution, workcamp, or other state or county detention facility used for the detention of persons convicted of a felony or a misdemeanor.

(2) "Inmate" means a person who is detained in a detention facility by reason of being convicted of a felony or a misdemeanor.

(3) "Medical treatment" means each visit initiated by the inmate to an institutional physician; physician's extender, including a physician's assistant or a nurse practitioner; registered nurse; licensed practical nurse; medical assistant; dentist; dental hygienist; optometrist; or psychiatrist for examination or treatment.

(4) "Officer in charge" means the warden, captain, or superintendent having the supervision of any detention facility.

(b) The commissioner or, in the case of a county facility, the officer in charge may establish by rules or regulations criteria for a reasonable deduction from money credited to the account of an inmate to:

(1) Repay the costs of:

(A) Public property willfully damaged or destroyed by the inmate during his or her incarceration;

(B) Medical treatment for injuries inflicted by the inmate upon himself or herself or others;

(C) Searching for and apprehending the inmate when he or she escapes or attempts to escape; such costs to be limited to those extraordinary costs incurred as a consequence of the escape; or

(D) Quelling any riot or other disturbance in which the inmate is unlawfully involved; or

(2) Defray the costs paid by the state or county for medical treatment for an inmate when the request for medical treatment has been initiated by the inmate.

(c) The provisions of paragraph (2) of subsection (b) of this Code section shall in no way relieve the governmental unit, agency, or subdivision having physical custody of an inmate from furnishing him or her with needed medical treatment.

(d) Notwithstanding any other provisions of this Code section, the deductions from money credited to the account of an inmate as authorized under subsection (b) of this Code section shall not be made whenever the balance in the inmate's account is \$10.00 or less.

(e) The officer in charge of any detention facility is authorized to charge a fee for establishing and managing inmate money accounts. Such fee shall not exceed \$1.00 per month. (Code 1981, § 42-5-55, enacted by Ga. L. 1996, p. 1081, § 3.)

**Effective date.** — This Code section became effective July 1, 1996.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, “; or” was added at the end of subparagraph (b)(1)(D).

**Editor's notes.** — This former Code section, relating to temporary transfer of con-

victed persons pending appeals and requests by convicted person or his attorney for transfer, was based on Ga. L. 1971, p. 341, § 3, and Ga. L. 1974, p. 479, § 1. This former Code section was repealed by Ga. L. 1982, p. 1364, § 3, effective January 1, 1983.

#### 42-5-56.

Repealed by Ga. L. 1982, p. 1364, § 3, effective January 1, 1983.

**Editor's notes.** — This Code section, relating to temporary transfer of convicted persons pending appeal and adoption of rules

and regulations by the board, was based on Ga. L. 1971, p. 341, § 4.

#### 42-5-57. Institution of rehabilitation programs; provision of opportunities for educational, religious, and recreational activities.

(a) The board, acting alone or in cooperation with the Department of Education, the Board of Regents of the University System of Georgia, or the several state, local, and federal agencies concerned therewith shall be authorized to institute a program of rehabilitation, which may include academic, industrial, mechanical, agricultural, and vocational training, within the confines of a penal institution.

(b) The department, in institutions under its control and supervision, shall give the inmates opportunity for reasonable educational, religious, and recreational activities where practicable. (Ga. L. 1956, p. 161, § 23; Ga. L. 1964, p. 734, § 1; Ga. L. 1968, p. 1399, § 4.)

**Administrative rules and regulations.** — Institutional, center, and program services, Official Compilation of Rules and Regula-

tions of State of Georgia, Rules of Georgia Board of Offender Rehabilitation, Chapters 415-4-1 through 415-4-7.

## JUDICIAL DECISIONS

**Cited in** *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga. 1968); *Krist v. Smith*, 309 F. Supp. 497 (S.D. Ga. 1970).

## OPINIONS OF THE ATTORNEY GENERAL

**Application to state prisoners.** — This section and § 42-2-11 relate to state prisoners rather than county prisoners; the distinction between "state" and "county" prisoners continues in effect even though both may be confined in a county work camp (now county correctional institution). 1970 Op. Att'y Gen. No. U70-134.

**Cost of instituting and maintaining academic programs** in conjunction with the Board of Regents is a legal expenditure for the Board of Offender Rehabilitation (Corrections). 1969 Op. Att'y Gen. No. 69-267.

**Prison authorities' discretion to regulate religious activities.** — The Department of Offender Rehabilitation (Corrections) should not deny permission to all Jehovah's Witnesses' ministers to visit the prisons or to conduct services therein; however, the denial of permission in individual instances, in the discretion of prison authorities, would appear to be lawful as a valid exercise of the state's power to regulate religious activities for the safety and welfare of its citizens. 1967 Op. Att'y Gen. No. 67-270.

**College attendance outside prison confines.** — The provisions of this section are not sufficiently broad to include or permit inmates who may be qualified to attend

college outside the confines of a state prison institution. 1967 Op. Att'y Gen. No. 67-119.

**Development of service-type industrial programs.** — The Board of Corrections is authorized to develop service-type industrial programs such as furniture refinishing, but such programs may not be developed by the Georgia Prison Industries Administration (now Georgia Correctional Industries Administration). 1970 Op. Att'y Gen. No. 70-156.

**Criterion for judging whether work performed by prisoner is prohibited** is not whether the articles on which prisoner is working are publicly or privately owned; the real test is whether the transaction was for a good faith purpose rather than a subterfuge designed to benefit the private owner. 1967 Op. Att'y Gen. No. 67-452.

**Use of prison store profits.** — The Board of Corrections can use profits generated in a prison store to offset the expense of employing an athletic director to direct athletic activities of inmates, by withdrawing such sums from the prison athletic fund and depositing the same in the treasury of the Board of Corrections. 1969 Op. Att'y Gen. No. 69-314.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 32, 33, 36-44, 100, 101.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 59, 70, 91-95.

**ALR.** — Constitutionality of statutes in relation to treatment or discipline of convicts, 50 ALR 104.

Provision of religious facilities for prisoners, 12 ALR3d 1276.



# **42-5-58. Prohibition against corporal punishment; use of handcuffs, leg chains, and other restraints; permissible punishment generally.**

(a) Whipping of inmates and all forms of corporal punishment shall be prohibited. All shackles, manacles, picks, leg irons, and chains shall be barred from use as punishment by any penal institution operated under authority of the board. In transferring violent or potentially dangerous inmates within an institution or between facilities, handcuffs, leg chains, waist chains, and waist belts may be utilized. Handcuffs, leg chains, waist chains, and waist belts may also be used in securing violent or potentially dangerous inmates within an institution and in public and private areas such as hospitals and clinics; but in no event may handcuffs, leg chains, waist chains, and waist belts be used as punishment; provided, however, if the accused becomes violent in the courtroom, restraints may be used.

(b) The department shall restrict punishment for an infraction of correctional rules and regulations to isolation and restricted diet or to uniform standard humane punishment which the department may deem necessary for the control of inmates. (Ga. L. 1956, p. 161, § 15; Ga. L. 1983, p. 1806, § 1; Ga. L. 1984, p. 22, § 42; Ga. L. 1989, p. 14, § 42.)

**Cross references.** — Cruel and unusual punishment, U.S. Const., Amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII. Prohibition against whipping as punishment for crimes, Ga. Const. 1983, Art. I, Sec. I, Para. XXI. Penalty for assault, etc., by state officer under color of office or commission, § 45-11-3.

**Administrative rules and regulations.** —

Discipline, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Board of Offender Rehabilitation, Chapter 415-3-2.

**Law reviews.** — For note, "Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia," see 8 Ga. L. Rev. 919 (1974).

## **JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1910, § 1176 are included in the annotations for this Code section.

**One in charge of state convicts cannot act with unlawful evidence** towards a person under his control; and if he does so, he may be guilty of a punishable offense. *Loeb v. Jennings*, 133 Ga. 796, 67 S.E. 101, 18 Ann. Cas. 376 (1910), aff'd, 219 U.S. 582, 31 S. Ct. 469, 55 L. Ed. 345 (1911).

**Corporal punishment.** — A warden has no authority to administer corporal punishment to a convict, except such as may be reasonably necessary to compel the convict to work or to maintain proper discipline. Therefore, corporal punishment of a convict

by a warden, administered where the circumstances are not of a character sufficient to authorize such punishment is an assault. *Westbrook v. State*, 133 Ga. 578, 66 S.E. 788, 25 L.R.A. (n.s.) 591, 18 Ann. Cas. 295 (1909).

**Whipping of child by parents with court-supplied strap.** — A judge is in violation of this section where he permits parents to whip an eight-year-old child with a court-supplied strap, rather than subjecting the child to incarceration and a criminal record. *In re Ellerbee*, 248 Ga. 246, 282 S.E.2d 313 (1981).

**Cited in** *Wilkes County v. Arrendale*, 227 Ga. 289, 180 S.E.2d 548 (1971); *Patterson v. MacDougall*, 506 F.2d 1 (5th Cir. 1975).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 138, 141-146.

**C.J.S.** — 18 C.J.S., Convicts, § 11. 72 C.J.S., Prisons and Rights of Prisoners, §§ 22, 26, 60.

**ALR.** — Constitutionality of statutes in relation to treatment or discipline of convicts, 50 ALR 104.

Prison conditions as amounting to cruel and unusual punishment, 51 ALR3d 111.

**42-5-59. Employment of inmates in the local community.**

(a) The commissioner shall extend the limits of the place of confinement of an inmate, if there is reasonable cause to believe the inmate will honor his trust, by authorizing the inmate, under prescribed conditions, to work at paid employment or participate in a training program in the community on a voluntary basis while continuing as an inmate of the institution to which he is committed, provided that:

(1) Representatives of local union central bodies or similar labor union organizations are consulted;

(2) The paid employment will not result in the displacement of employed workers, be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services; and

(3) The rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the locality in which the work is to be performed.

(b) An inmate authorized to work at paid employment in the community under subsection (a) of this Code section shall comply with all rules and regulations promulgated by the board relative to the handling, disbursement, and holding in trust of all funds earned by the inmate while under the jurisdiction of the department. An amount determined to be the cost of the inmate's keep and confinement shall be deducted from the earnings of each inmate, and such amount shall be deposited in the treasury of the department; provided, however, that, if the inmate is assigned to a county correctional institution, the deducted amount shall be deposited in the treasury of the county to which the inmate is assigned. After the deduction for keep and confinement, the commissioner shall:

(1) Allow the inmate to draw from the balance a reasonable sum to cover his incidental expenses;

(2) Retain to the inmate's credit an amount as is deemed necessary to accumulate a reasonable sum to be paid to him on his release from the penal institution;

(3) Deduct from the inmate's funds any amounts necessary to cover the costs of medical or dental attention provided to the inmate, said

deductions to be made in accordance with policies and procedures promulgated by the commissioner; and

(4) Cause to be paid any additional balance as is needed for the support of the inmate's dependents.

(c) No inmate employed in the community under subsection (a) of this Code section shall be deemed to be an agent, employee, or involuntary servant of the department while working in the community or going to and from his employment.

(d) The willful failure of an inmate to remain within the extended limits of his confinement or to return within the time prescribed to an institution designated by the commissioner shall be deemed an escape from a penal institution and shall be punishable by law. (Ga. L. 1956, p. 161, § 13; Ga. L. 1968, p. 1399, § 1; Ga. L. 1969, p. 602, § 1; Ga. L. 1971, p. 435, § 1; Ga. L. 1973, p. 1299, § 1; Ga. L. 1986, p. 1596, § 1; Ga. L. 1994, p. 97, § 42.)

**Administrative rules and regulations.** — Work release, Official Compilation of Rules and Regulations of State of Georgia, Rules of

Georgia Board of Offender Rehabilitation, Chapter 415-3-6.

### JUDICIAL DECISIONS

**Cited in** Overby v. State, 150 Ga. App. 319, 257 S.E.2d 386 (1979); Wise v. Balkcom, 245 Ga. 126, 263 S.E.2d 158 (1980); Whiddon v.

State, 160 Ga. App. 777, 287 S.E.2d 114 (1982).

### OPINIONS OF THE ATTORNEY GENERAL

**Statutory provisions mandatory.** — The language of this section, and §§ 42-5-50 and subsection (d) of 42-5-51, is mandatory. 1977 Op. Att'y Gen. No. 77-71.

**Performance of federal contracts.** — This section fully complies with requirements set forth in Executive Order 11755 which provides that nonfederal prison inmates may be employed in performance of federal contracts if the inmate participates in the work-release program on a voluntary basis, if representatives of local labor organizations have been consulted, if the inmate's employment will not result in the displacement of employed workers or result in a surplus of laborers in the locality, and if the rates of pay and other conditions of employment are not less than those provided for similar work in the locality. 1974 Op. Att'y Gen. No. 74-125.

**Work-release programs.** — A county may not recover its expenses in maintaining prisoners employed in work-release programs. 1969 Op. Att'y Gen. No. 69-248.

The room and board charges of prisoners on work release (subsection (b) of this section) must be deposited into the state treasury. 1969 Op. Att'y Gen. No. 69-363.

The work-release program does not authorize compensation of inmates for work performed in institutions. 1973 Op. Att'y Gen. No. 73-7.

There is no authority for the superintendent of a correctional institution to allow work releasees to reside in their homes; a work releasee shall continue to be a prisoner of the institution to which he has been committed. 1974 Op. Att'y Gen. No. 74-116.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 159.

**ALR.** — Validity of statute empowering administrative officials to transfer to penitentiary inmate of reformatory, 95 ALR 1455.

What justifies escape or attempt to escape, or assistance in that regard, 70 ALR2d 1430.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 ALR4th 773.

**42-5-60. Hiring out of inmates; sale of products produced by inmates; disposition of proceeds; payment to inmates for services.**

(a) The board shall provide rules and regulations governing the hiring out of inmates by any penal institution under its authority to municipalities, cities, the Department of Transportation, and any other political subdivision, public authority, public corporation, agency, or state or local government, which entities are authorized by this subsection to contract for and receive the inmates. Such inmates shall not be hired out to private persons or corporations, nor shall any instrumentality of government authorized by this subsection to utilize penal labor use such labor in any business conducted for profit, except as provided in Code Section 42-5-59; provided, however, inmate trainees enrolled in any vocational, technical, or educational training program authorized and supported by the department may repair or otherwise utilize any privately owned property or equipment as well as any other property or equipment in connection with the activities of any such training program, so long as the repair or utilization contributes to the inmate's acquisition of any desired vocational, technical, or educational skills. Notwithstanding any other provisions of this subsection, any private person, organization, or corporation with whom the commissioner has contracted for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state prison or for any services related to the custody, care, and control of inmates as authorized by Code Section 42-2-8 may utilize penal labor in the same manner as any such labor may be utilized by any other penal institution operated under the authority of the board. Agreements made pursuant to Code Section 42-2-8 for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state prison or for any services related to the care, custody, and control of inmates shall factor the value of penal labor such that the state is the only financial beneficiary of the same.

(b) No goods, wares, or merchandise which has been manufactured, produced, or mined, wholly or in part, by the inmates of any state or county correctional institution operated under the jurisdiction of the board shall be sold in this state to any private person, firm, association, or corporation, except that this prohibition shall not apply to:

(1) Sales to private colleges and universities; or

(2) A sale to a private contractor of goods, wares, or merchandise for use in the completion of a publicly funded project.

Nothing in this subsection shall be construed to forbid the sale of such goods or merchandise to other political subdivisions, public authorities, municipalities, or agencies of the state or local governments to be consumed by them or to agencies of the state to be in turn sold by the agency to the public in the performance of the agency's duties as required by law. This subsection does not prohibit the sale of unprocessed agricultural products produced on state property.

(c) Funds arising from the sale of goods or other products manufactured or produced by any state correctional institution operated by the department shall be deposited with the treasury of the department. The funds arising from the sale of goods and products produced in a county correctional institution or from the hiring out of inmates shall be placed in the treasury or depository of the county, as the case may be. The department is authorized, pursuant to rules and regulations adopted by the board, to pay compensation of not more than \$25.00 per month from funds available to the department to each inmate employed in any industry.

(d) Any superintendent, warden, guard, official, or other person who violates this Code section or any regulations promulgated pursuant thereto, relating to the sale of goods or products manufactured or produced in a correctional institution or the hiring out of inmates, shall be guilty of a misdemeanor.

(e) The department or any state correctional institution or county correctional institution operating under jurisdiction of the board shall be authorized to require inmates coming into its custody to labor on the public roads or public works or in such other manner as the board may deem advisable. The department may also contract with municipalities, cities, counties, the Department of Transportation, or any other political subdivision, public authority, public corporation, or agency of state or local government created by law, which entities are authorized by this Code section to contract with the department, for the construction, repair, or maintenance of roads, bridges, public buildings, and any other public works by use of penal labor.

(f) Any provision of this chapter to the contrary notwithstanding, any inmate of any state or county correctional institution operated under the jurisdiction of the board may sell goods, wares, and merchandise created by such inmate through the pursuit of a hobby or recreational activity. The proceeds from the sales shall be distributed to the particular inmate who created the goods, wares, or merchandise. The board is authorized to promulgate rules and regulations governing the sale of such goods, wares, and merchandise and the distribution of the proceeds from the sales. All goods, wares, and merchandise created by an inmate must be sold within the institution or on the institution grounds during visiting hours or when on off-duty assignments. (Ga. L. 1956, p. 161, § 22; Ga. L. 1957, p. 477, § 4; Ga. L. 1968, p. 1092, § 1; Ga. L. 1968, p. 1399, §§ 2, 3; Ga. L. 1971, p. 581,

§ 1; Ga. L. 1972, p. 577, § 1; Ga. L. 1984, p. 651, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1992, p. 6, § 42; Ga. L. 1993, p. 629, § 1; Ga. L. 1997, p. 851, § 2.)

**The 1997 amendment**, effective April 21, 1997, added the last two sentences in subsection (a).

**Cross references.** — Hiring out of inmates for public road projects, §§ 32-4-42, 32-4-91. Correctional Industries, Ch. 10 of this title. Use of inmate labor to abate hazard pre-

sented by abandoned well or hole, § 44-1-14.

**Administrative rules and regulations.** — Work release, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Board of Offender Rehabilitation, Chapter 415-3-6.

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Penal Code 1910, § 1166 are included in the annotations for this Code section.

**Charge against county for labor.** — There is nothing in this and the following sections authorizing or requiring a charge to be made against a county for the labor of misdemeanor convicts sentenced by the courts in such county to work on its chain gang (now county facilities or programs). *Binns v. Ficklen*, 130 Ga. 377, 60 S.E. 1051 (1908).

**A convict cannot be hired out to a private individual.** *County of Walton v. Franklin*, 95 Ga. 538, 22 S.E. 279 (1894).

**Law requiring county to pay for hire of misdemeanor convicts.** — A special law requiring the county to pay for hire of misdemeanor convicts is unconstitutional, there being a general law relating to this subject. *Binns v. Ficklen*, 130 Ga. 377, 60 S.E. 1051 (1908).

## OPINIONS OF THE ATTORNEY GENERAL

### ANALYSIS

#### GENERAL CONSIDERATION

#### RULES GOVERNING HIRING OUT INMATES

1. IN GENERAL
2. PUBLIC WORKS
3. PRIVATE ENDEAVORS

#### SALE OF INMATES' PRODUCTS

1. IN GENERAL
2. WITHIN STATE
3. OUTSIDE OF STATE

### General Consideration

**Negotiation for use of prison labor in roads construction.** — Any agreement for the use of prison labor in constructing roads by the state must be negotiated by the Highway Department (now Department of Transportation) and the governmental unit having custody of the prisoners. 1969 Op. Att'y Gen. No. 69-5.

**The board is authorized to develop service-type industrial program** such as furniture refinishing, but such programs may

not be developed by the Georgia Prison Industries Administration (now Georgia Correctional Industries Administration). 1970 Op. Att'y Gen. No. 70-156.

**Transporting prisoners to job site.** — No legal problem exists in transporting prisoners by barge to a job site. 1969 Op. Att'y Gen. No. 69-5.

**Rules governing payments to inmates.** — The place of confinement is irrelevant; if a state prisoner is engaged in an endeavor which may be classified as "industry," he would be eligible for incentive pay upon the



**General Consideration (Cont'd)**

adoption of an appropriate administrative rule; state prisoners confined in county public works camps (now county correctional institutions), would be paid from funds available to the board as no provision was made for payments from county funds. 1968 Op. Att'y Gen. No. 68-464.

**Rules Governing Hiring Out Inmates****1. In General**

**Board prescribes conditions of work required of prisoners** and retains administrative responsibility, etc., of prisoners. In view of the broad language found in subsection (e) of this section that prison labor could be required in public buildings in any such manner as deemed advisable by the Board of Offender Rehabilitation (Corrections), it is obvious that the legislature intended the board to prescribe the conditions of work required of the prisoners; and even though some of the prisoners are physically restrained for overnight periods in county jails, their primary assignment is, nonetheless, to the prison or public work camp (now county correctional institution) as determined by the commissioner; in turn the prison or camp has sole administrative responsibility and control of the prisoner even though he may be temporarily attached to the county jail to perform the required repair or maintenance services; such a temporary attachment is not an assignment which contravenes the language of subsection (b) of § 42-5-50. 1963-65 Op. Att'y Gen. p. 72.

**Use of prison labor for governmental functions.** — Prison labor may be used only in connection with those services and functions of municipalities which are deemed "governmental" in nature as opposed to "ministerial" functions which are those performed by municipalities for profit. 1963-65 Op. Att'y Gen. p. 632.

**"Hiring" defined.** — An indispensable element of "hiring" is the rendering of services for compensation or something in return — a quid pro quo. 1960-61 Op. Att'y Gen. p. 349.

**Permissible use of prisoners.** — This section includes no prohibition to the use of prisoners on road projects where federal

funds are involved. 1965-66 Op. Att'y Gen. No. 65-52.

**And prohibited use of prisoners.** — Prisoners in the Georgia penal system may not be leased to the United States Forest Service, which is an agency of the United States government. 1967 Op. Att'y Gen. No. 67-451.

**2. Public Works**

**Public work defined.** — The courts will hold a public work to be any project upon which public funds could be lawfully expended; the underlying factual issue will always be the extent, if any, to which the public will receive common or corporate benefit. 1969 Op. Att'y Gen. No. 69-470.

**Granting of an "easement"** must not be taken as conclusively establishing the public nature of a works project. 1969 Op. Att'y Gen. No. 69-470.

**Permissible works for use of inmates.** — It is legally permissible to use inmates of the prison system for daily civic labor in and about a municipality in exchange for the use by the Board of Offender Rehabilitation (Corrections) of an existing prison facility owned by the municipality. 1963-65 Op. Att'y Gen. p. 632.

**Presentment of educational programs to civic clubs.** — Inmates in the Georgia prison system may, at the discretion of appropriate prison officials, present educational programs to civic clubs, even though the presentation may be in a privately owned facility. 1969 Op. Att'y Gen. No. 69-221.

**Erection of hospitals.** — Convict labor may be used, under control of county authorities, in erection of hospital by the county hospital authority. 1945-47 Op. Att'y Gen. p. 422 (decided under former Code 1933, § 77-325 prior to revision by Ga. L. 1956, p. 161, § 22).

**Building or repairing schools.** — A county may permit use of convicts in building or repairing a public school building in a municipality if the convicts remain under the control and management of the county authorities. 1945-47 Op. Att'y Gen. p. 423.

**Prison labor may be utilized to construct roads** on land owned by the state. 1969 Op. Att'y Gen. No. 69-5.

**Felony convicts may be used in the maintenance of roads** in the state-aid system. 1945-46 Op. Att'y Gen. p. 424.

**Inmates may be required to perform labor upon prison property**, including the preparation of mobile home sites, if that is what is desired of their labors. 1969 Op. Att'y Gen. No. 69-418.

**Farming.** — Board of Corrections may enter into an agreement with a county whereby the county gives the prison a crop allotment and allows the prison to farm county property, furnishing the fertilizer and equipment for gathering the crop and in return for which, the county is to receive a portion of the crop grown on the property, with the remainder to be consumed within the prison branch. 1970 Op. Att'y Gen. No. 70-83.

**Use of convict labor on private property is permissible** where the sole benefit flows to the state, and it is the duty of the Board of Offender Rehabilitation (Corrections) to examine each set of facts and determine whether the state is benefiting in the necessary degree. 1965-66 Op. Att'y Gen. No. 66-119.

### 3. Private Endeavors

**Use of convict labor on private property is permissible** where the sole benefit flows to the state. 1969 Op. Att'y Gen. No. 69-158.

**Removal and resetting of fences.** — The Highway Department (now Department of Transportation), can contract with private property owner to use prison labor or state maintenance forces to remove and reset fences upon private property which is to be used as right of way since the utilization of prison labor is to the benefit of the state; the department cannot guarantee to a county that it will perform these acts or expend this money if a county in turn entered into such an agreement with the private landowner which guaranteed to the private landowner that the state would perform such acts. 1969 Op. Att'y Gen. No. 69-158.

**Removal of buildings.** — This section would not prohibit use of prison labor to remove a building from private property and to erect the same on state property where the sole benefit would flow to the state. 1958-59 Op. Att'y Gen. p. 250.

**Clearing land.** — City not prohibited from using prison labor to clear private land under local health ordinance, so long as transaction is for good faith public purpose, rather than a subterfuge designed to benefit

the private owner. 1958-59 Op. Att'y Gen. p. 248.

An agreement between warden of prison branch and private landowner, whereby in consideration of warden's clearing five acres of land belonging to landowner, he will permit prison branch to occupy land rent free for period of three years, is not illegal, so long as it was entered into in good faith, for the purpose of procuring the use of land for the state, rather than as a guise whereby the private landowner is enabled to receive a gratuity from the state, prohibited by Ga. Const. 1976, Art. III, Sec. VIII, Para. XII (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI). 1958-59 Op. Att'y Gen. p. 248.

**Soil conservation projects.** — It is legal to utilize convict labor to remove buildings on private land in connection with soil conservation projects being conducted by soil conservation district supervisors, for the purpose of constructing water impounding structures and flooding pools, since soil conservation districts are expressly declared to be agencies of the state government by §§ 2-6-22 and 2-6-33, whose powers and duties include the erection of soil conservation structures. 1958-59 Op. Att'y Gen. p. 250.

**Use of inmate labor to position and level a correctional officer's mobile home site** on prison property is not a violation of Ga. Const. 1976, Art. III, Sec. VIII, Para. XII (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI). 1969 Op. Att'y Gen. No. 69-418.

**Convict labor may be used for construction of school gymnasium** though private contractor constructing where there are no disbursements or credits for use of such labor between board of education and contractors. 1962 Op. Att'y Gen. p. 379.

**Corporation within prohibited category.** — Although a corporation is imbued with a community purpose and no profit is contemplated by the stockholders, it is nevertheless clearly within the prohibited category of private persons or corporation. 1963-65 Op. Att'y Gen. p. 317.

**Prison labor could not be used in home for aged and infirm** to be constructed by county and operated by charitable organization, where control and management of home would be in hands of directors of organization; any arrangement whereby the custody, control, and labor of prisoners are vested in private parties would be illegal, and



### Rules Governing Hiring Out Inmates (Cont'd)

the prisoners would be entitled to relief by habeas corpus. 1958-59 Op. Att'y Gen. p. 246.

**Manufacture of tags for private sale.** — The Board of Offender Rehabilitation (Corrections) is prohibited from manufacturing tags in the penal institutions of this state for private sale to any person, including charitable organizations such as the Veterans of Foreign Wars. 1952-53 Op. Att'y Gen. p. 400.

**Using prisoners for work on private highways.** — Counties may not use prison labor to repair and maintain private driveways which have not been validly dedicated to public use. 1963-65 Op. Att'y Gen. p. 426.

**Work on private vehicles.** — It is not permissible for inmates of a training and development center for state prisoners to perform work on private vehicles to obtain practice in carrying out procedures learned in the automobile school. 1967 Op. Att'y Gen. No. 67-452.

### Sale of Inmates' Products

#### 1. In General

**Manufacturing operations conducted by Board of Corrections.** — This section is applicable to manufacturing operations conducted by a prison operated by the Board of Corrections other than those manufacturing activities which are carried on by the Georgia Prison Industries Administration (now Georgia Correctional Industries Administration). 1968 Op. Att'y Gen. No. 68-126.

**Use of inmates in civilian business.** — The real thrust of this prohibition is against actual use of inmates in a civilian business. 1972 Op. Att'y Gen. No. 72-96.

**Canned and packed vegetables distinguished.** — Canned vegetables are "goods, wares, or merchandise", and packed vegetables are considered "manufactured" or "produced". 1965-66 Op. Att'y Gen. No. 65-28.

**"Goods, wares, or merchandise" construed.** — The phrase "goods, wares, or merchandise," as set out in subsection (b) of this section, should be construed in its ordinary sense; this means such chattels as are ordinarily the subject of traffic and trade. 1972 Op. Att'y Gen. No. 72-96.

**The board is authorized to sell to a municipality goods, wares, or merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners.** 1954-56 Op. Att'y Gen. p. 530.

**Hospital authorities may purchase goods manufactured by the Georgia Correctional Industries Administration.** 1970 Op. Att'y Gen. No. 70-88.

#### 2. Within State

**Selling products produced by prison labor to other departments.** — The Board of Offender Rehabilitation (Corrections) is authorized to sell to other departments of the state government any products produced by prison labor in a program of occupational and vocational training. 1948-49 Op. Att'y Gen. p. 286.

**Solicitation of paid advertisement in inmate publication.** — The restrictions on the sale of goods produced by inmates do not prohibit the solicitation and acceptance of paid advertising in an inmate publication. 1972 Op. Att'y Gen. No. 72-96.

#### 3. Outside of State

**Sale of goods outside state.** — Although this section does not prohibit the sale of goods, wares, or merchandise manufactured by inmates to firms or corporations outside the state, the words "no goods shall be sold in this state" indicate that no sale can be perfected. 1965-66 Op. Att'y Gen. No. 66-237.

**Goods packed out of state.** — Subsections (b) and (d) of this section do not relate to goods which have been packed outside of this state by prison labor of another state. 1965-66 Op. Att'y Gen. No. 65-28.

**Sales to factories for the blind.** — The Georgia Correctional Industries Administration may be authorized to sell prisoner-made products to factories for the blind located in other states, providing the local state law does not prohibit the sale of prisoner-manufactured goods. 1974 Op. Att'y Gen. No. 74-157.

**Sales to government contractors.** — There are no prohibitions in existence under statutes of this state restricting sales of products manufactured or produced by the Georgia Prison Industries Administration (now Georgia Correctional Industries Administration)



to government contractors outside the state. 1967 Op. Att'y Gen. No. 67-349.

**Sales made outside state excluded.** — Due to the fact that subsection (b) of this section prohibits only sales within the state to private persons, firms, associations, or corporations it is to be concluded that this expressed

prohibition is to be construed as to the extent of the legislature's sanctions on sales of prison made or produced products and, therefore, that any sales made beyond the state are excluded from these prohibitions. 1967 Op. Att'y Gen. No. 67-349.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 162-172.

**C.J.S.** — 18 C.J.S., Convicts, §§ 13-20.

#### **42-5-60.1. Utilization of inmates of county correctional institutions for work on outdoor assignments during inclement weather; supervision of inmates.**

(a) As used in this Code section, the term "inclement weather" means weather in which there is rain or in which the temperature is below 28 degrees Fahrenheit.

(b) Inmates of a county correctional institution who are otherwise required to work on outdoor assignments shall work on such assignments notwithstanding inclement weather if employees of any governmental entity within the county in which the work is to be performed are performing outdoor work during such inclement weather and such work is similar in kind or in degree of exertion to that to be performed by the inmates.

(c) Correctional officers and other supervisory personnel shall be available to supervise adequately those inmates performing outdoor work in inclement weather. (Ga. L. 1981, p. 1421, § 1.)

#### **42-5-61. Services and benefits to be furnished inmates discharged by department or county correctional institutions.**

(a) Except as otherwise provided in this Code section, whenever an inmate is discharged upon pardon or completion of his sentence or is conditionally released or paroled from any place of detention to which he has been assigned under the authority of the department, the department shall provide the inmate the following:

(1) Transportation to the inmate's home within the United States or to a place chosen by the inmate and authorized by regulations of the board;

(2) An amount of money of not less than \$25.00 and not more than \$150.00, as determined according to regulations of the board; and

(3) A travel kit, when appropriate, and suitable clothing, each as provided by regulation of the board.

(b) Whenever an inmate assigned to a county correctional institution by the department is discharged upon pardon or completion of his sentence

or is conditionally released or paroled, the county shall provide the inmate the release benefits to which he is eligible under this Code section, and the department shall reimburse the county.

(c) An inmate whose limits of confinement have been extended to allow him to participate in a work-release program of paid employment shall receive the benefits provided by this Code section only to the extent of financial need, as determined pursuant to regulations of the board.

(d) An inmate convicted of an offense which is less than a felony shall receive the amount of \$25.00 or less as determined under regulations of the board and transportation as provided in this Code section.

(e) The department shall administer these benefits through regulations which are based upon the knowledge and skill of the board in aiding an inmate to make the initial adjustment to his release. (Ga. L. 1956, p. 161, § 21; Ga. L. 1969, p. 600, § 1; Ga. L. 1972, p. 602, § 1; Ga. L. 1973, p. 542, § 1.)

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**Legislative intent.** — This statute was intended to alleviate hardships which prisoners encounter on reentry into free society; this policy would apply to a second release as well as a first, especially the inmate who was unsuccessful in his first attempt to make the social adjustment to freedom. 1972 Op. Att'y Gen. No. 72-102.

**Issuance of suitable clothing to inmates released.** — This section permits the Board of Offender Rehabilitation (Corrections) to issue either work clothes or a business suit to inmates who are discharged, paroled, or conditionally released. 1972 Op. Att'y Gen. No. 72-160.

**Second release inmates entitled to benefits.** — An inmate who has been paroled, conditionally released, or released on probation, and upon his release has been given benefits pursuant to this section, and who has been returned to prison for violation of the conditions of his release, is again entitled to receive benefits under this statute upon the completion of his sentence, provided he is otherwise qualified. 1972 Op. Att'y Gen. No. 72-102.

**Prisoner released upon payment of fine** may fall within the category of prisoner "discharged upon completion of sentence" or within the category of a "conditionally released" prisoner, depending upon the par-

ticular order entered to effectuate the release; prisoners discharged in these categories with reference to discharge by payment of a fine are entitled to the benefits provided by this section. 1969 Op. Att'y Gen. No. 69-245.

**Other released inmates entitled to benefits.** — Inmates being released from county jails who were committed to the director of corrections (now commissioner of corrections) and who have had files prepared for them by the Georgia Diagnostic and Classification Center, but who have not been picked up by the center, are entitled to the gratuities provided in this section. 1975 Op. Att'y Gen. No. 75-93.

**A prisoner who is released "by reason of remission to probation"** is entitled to the benefits provided for in this section. 1969 Op. Att'y Gen. No. 69-245.

**A prisoner who is discharged by an order of "remission to present service"** is entitled to the benefits provided for by this section. 1969 Op. Att'y Gen. No. 69-245.

**A prisoner released to a detainer** is not entitled to benefits provided by this section; it is not contemplated that the state prison uniform will be taken away from a prisoner released under this category. 1969 Op. Att'y Gen. No. 69-245.

## RESEARCH REFERENCES

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, § 155.

**42-5-62. Forfeiture of contraband.**

The possession by an inmate on his person or in his cell, immediate sleeping area, locker, or immediate place of work or assignment of any form of securities, bonds, coins, currency, or legal tender, unless expressly and specifically authorized by the individual institution concerned, shall constitute contraband and be subject to forfeiture. With respect to state correctional institutions, all such securities, bonds, coins, currency, or legal tender shall vest in the state and shall be paid into the state treasury. With respect to county correctional institutions, all such currency and other items shall vest in the county and shall be paid into the county treasury. (Ga. L. 1980, p. 1095, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 106.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61, 75.

**42-5-63. Unauthorized possession of weapon by inmate.**

(a) Every person confined in a penal institution or confined in any other facility under the jurisdiction of or subject to the authority of the board or who, while being conveyed to or from any facility, or while at any other location under such jurisdiction or authority, or while being conveyed to or from any such place, or while under the custody of officials, officers, or employees subject to such jurisdiction or authority, who, without authorization of the appropriate authorities, possesses or carries upon his person or has under his custody or control any instrument or weapon of the kind commonly known as a blackjack, slingshot, billy, sandclub, sandbag, or metal knuckles; or any pistol, revolver, or other firearm; or any explosive substance; or any dirk, dagger, switchblade, gravity knife, razor, or any other sharp instrument which is capable of such use as may endanger the safety or security of any of the facilities described in this subsection or of any person therein shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for a term of not less than one nor more than five years.

(b) A person is deemed "confined in a penal institution" if he is confined in any of the penal institutions specified in subsection (a) of this Code section by order made pursuant to law, regardless of the purpose of the confinement and regardless of the validity of the order directing the confinement, until a judgment of a competent court setting aside the order becomes final so as to entitle the person to his immediate release.



(c) A person is deemed "confined in" a penal institution even if, at the time of the offense, he is temporarily outside its walls or bounds for the purpose of confinement in a local place of confinement pending trial or for any other purpose for which an inmate may be allowed temporarily outside the walls or bounds of a penal institution; but an inmate who has been released on parole is not deemed "confined in" a penal institution for purposes of this Code section. (Ga. L. 1973, p. 555, § 1; Ga. L. 1989, p. 14, § 42.)

**Cross references.** — Penalty for possession of firearms by convicted felons, § 16-11-131.

### JUDICIAL DECISIONS

**Constitutionality.** — This section which prohibits prison inmates from having deadly weapons does not violate the equal protection clause of U.S. Const., Amend. 14. *Ridley v. State*, 232 Ga. 646, 208 S.E.2d 466 (1974).

This section is not unconstitutionally vague or indefinite, and is consistent with due process requirements of both state and federal Constitutions, and is reasonable and necessary for the security and protection of correctional institutions and the people who reside and work in such institutions. *Ridley v. State*, 232 Ga. 646, 208 S.E.2d 466 (1974).

**Making out a prima facie case.** — On indictment under this section, proof that the defendant, a convict, was searched while passing from one building to another, and a knife meeting the description of this section was found on his person, makes out a prima facie case. If the defendant claims authorized possession, the burden is on him to offer evidence to that effect. *Days v. State*, 134 Ga. App. 585, 215 S.E.2d 520 (1975).

**Subsection (b) of this section does not make production of an order an essential element of the crime which must be admit-**

ted into evidence at trial. *Lehman v. State*, 174 Ga. App. 767, 332 S.E.2d 17 (1985).

**Offense not lesser included offense of aggravated assault.** — Offense of unauthorized possession of weapon by inmate is not a lesser included offense of aggravated assault. *Weaver v. State*, 176 Ga. App. 639, 337 S.E.2d 420 (1985).

**Fact that weapon was found in defendant's locker,** which was locked, with defendant having the only key save a master key used by prison officials, was sufficient evidence to establish that he had exclusive custody and control of the weapon. *Black v. State*, 179 Ga. App. 170, 345 S.E.2d 678 (1986).

**Evidence was sufficient to sustain conviction.** — See *Hood v. State*, 192 Ga. App. 150, 384 S.E.2d 242 (1989); *Dixon v. State*, 192 Ga. App. 845, 386 S.E.2d 719 (1989).

**Cited in** *Chaney v. State*, 139 Ga. App. 211, 228 S.E.2d 199 (1976); *Mathis v. State*, 139 Ga. App. 322, 228 S.E.2d 358 (1976); *Austin v. State*, 146 Ga. App. 236, 246 S.E.2d 143 (1978); *Raven v. State*, 168 Ga. App. 398, 309 S.E.2d 656 (1983); *Slater v. State*, 185 Ga. App. 889, 366 S.E.2d 240 (1988).

### RESEARCH REFERENCES

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 61, 62, 75.

**ALR.** — Cane as a deadly weapon, 30 ALR 815.

Sufficiency of evidence of possession in

prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 43 ALR4th 788.

**42-5-64. (For effective date, see note) Educational programming.**

(a) The commissioner shall maintain an educational program within the state prison system to assist inmates in achieving at least a fifth-grade level on standardized reading tests. Inmates who test below the fifth-grade level will be encouraged by institutional staff to attend appropriate classes until they attain this level.

(b) For the purposes of this Code section, educational programming shall not apply to inmates who:

- (1) Have been sentenced to death;
- (2) Have attained 50 years of age; or
- (3) Have serious learning disabilities.

(c) The commissioner shall provide additional educational programs in which inmates can voluntarily participate to further their education beyond the fifth-grade level.

(d) The commissioner shall utilize available services and programs within the Department of Education, and the Department of Education shall cooperate with the commissioner in the establishment of educational programs and the testing of inmates as required in this Code section.

(e) The commissioner shall be authorized to promulgate rules and regulations necessary to carry out the provisions of this Code section. (Code 1981, § 42-5-64, enacted by Ga. L. 1986, p. 1596, § 2; Ga. L. 1992, p. 3219, § 1.)

**Delayed effective date.** — Ga. L. 1992, p. 3219, § 2, provides: "This Act shall become effective only when funds are specifically appropriated for purposes of this Act in an appropriations Act making specific reference to this Act. This Act shall apply to those inmates sentenced to the Department of Corrections after its effective date." No such funds were appropriated by the General Assembly at the 1992, 1993, 1994, 1995, 1996, or 1997 sessions.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1986, "programming" was substituted for "programing" in subsection (b).

Pursuant to Code Section 28-9-5, in 1992, in subsection (a) as amended by Ga. L. 1992, p. 3219, § 1, "Paroles" was substituted for "Parole" in the fourth sentence of subsection (a).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 100.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, § 59.

## ARTICLE 4

GRANTING SPECIAL LEAVES, EMERGENCY LEAVES, AND LIMITED  
LEAVE PRIVILEGES**42-5-80. Authorization and general procedure for granting special leave.**

Whenever recommended by the warden or superintendent of any penal institution in which inmates committed to the custody of the commissioner have been assigned, the commissioner may grant special leave to an inmate to leave the institution in which he is incarcerated for participation in special community or other meritorious programs or activities deemed beneficial to the inmate and not detrimental to the public. The activity must be such as, in the opinion of the warden or superintendent and the commissioner, will contribute to the rehabilitation process of the inmate involved. In order to be considered for this special leave, the inmate shall be eligible solely upon the concurrence of the warden or superintendent and the commissioner that positive attitudinal and growth patterns are being established. Under no condition shall any inmate be permitted to leave the state under this Code section. This Code section shall not apply to convicted sex offenders. (Ga. L. 1971, p. 342, §§ 1, 2; Ga. L. 1972, p. 579, §§ 1, 2; Ga. L. 1975, p. 898, § 1.)

**Administrative rules and regulations.** — Georgia Board of Offender Rehabilitation, Special leave, Official Compilation of Rules and Regulations of State of Georgia, Rules of Chapter 415-2-4.16.

**42-5-81. Issuance of special leave; filing.**

All special leaves must be issued in writing, must set a determinate period of duration, and must be signed by both the warden or superintendent and by the commissioner; this authority may not be delegated except as provided in Code Section 42-5-84. All such writings must be kept on file in the office of the commissioner. (Ga. L. 1971, p. 342, § 2; Ga. L. 1972, p. 579, § 2.)

**42-5-82. Purposes for which special leave may be granted.**

A special leave may be granted for the purpose of:

- (1) Attending educational programs;
- (2) Improving job skills;
- (3) Attending trade licensing examinations;
- (4) Being interviewed for employment;
- (5) Participating in drug abuse, delinquency, or crime prevention programs;



(6) Participating as a volunteer for a nonprofit organization or governmental agency in an activity serving the general public; or

(7) For any purpose which the department deems beneficial to both the inmate and the public. (Ga. L. 1971, p. 342, § 3; Ga. L. 1972, p. 579, § 3.)

#### **42-5-83. Emergency leaves.**

The warden or superintendent of any penal institution in which inmates committed to the custody of the commissioner have been assigned may authorize, without the prior written approval of the commissioner, emergency leave to an inmate when it is confirmed that there exists a serious illness or death in the inmate's immediate family and when notice and confirmation of the illness or death does not reach the warden or superintendent in time to authorize special leave in the manner provided in Code Section 42-5-81. Emergency leave cannot be granted under this Code section to any inmate who has been convicted of a sex offense, who has escaped or attempted to escape within 12 months preceding the emergency, who has not served sufficient time to demonstrate his responsibility and dependability, or who has an assaultive pattern determined to exist either from the nature of the offense for which he has been convicted or from conduct while incarcerated in the penal institution. The warden or superintendent granting the emergency leave must forward immediately a written report of the action to the commissioner. (Ga. L. 1975, p. 898, § 2.)

#### **42-5-84. Delegation of authority to issue limited leave privileges; records.**

The commissioner may delegate to any warden or superintendent of any penal institution in which inmates committed to his custody have been assigned the authority to issue limited privileges to leave the confines of the institution, not to exceed 12 hours and not to extend beyond daylight hours, to any inmate for whom the commissioner has extended, under the authority of Code Section 42-5-59, the limits of the inmate's place of confinement. The limited privileges authorized in this Code section may only be granted to accomplish the purposes enumerated in Code Section 42-5-82. The warden or superintendent granting privileges under this Code section must maintain detailed records of passes authorized by this Code section. (Ga. L. 1975, p. 910, § 1.)

#### **42-5-85. Leave privileges of inmates serving murder sentences.**

(a) As used in this Code section only, the term "aggravating circumstance" means that:

(1) The murder was committed by a person with a prior record of conviction for a capital felony;

(2) The murder was committed while the offender was engaged in the commission of another capital felony, aggravated battery, burglary, or arson in the first degree;

(3) The offender, by his act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor-general, or former district attorney, solicitor, or solicitor-general was committed during or because of the exercise of his or her official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement of himself or another.

(b) No special leave, emergency leave, or limited leave privileges shall be granted to any inmate who is serving a murder sentence unless the commissioner has approved in writing a written finding by the department that the murder did not involve any aggravating circumstance.

(c) The department shall make a finding that a murder did not involve an aggravating circumstance only after an independent review of the record of the trial resulting in the conviction or of the facts upon which the conviction was based. (Code 1981, § 42-5-85, enacted by Ga. L. 1983, p. 1806, § 2; Ga. L. 1984, p. 22, § 42; Ga. L. 1996, p. 748, § 22.)

**The 1996 amendment**, effective July 1, 1996, in paragraph (5) of subsection (a), substituted "solicitor-general" for "solicitor" preceding "or former", substituted "

solicitor, or solicitor-general" for "or solicitor" and inserted "or her" near the end.

**Editor's notes.** — Ga. L. 1996, p. 748, § 27, not codified by the General Assembly,

provides: "Notwithstanding any other provision of law, an Act approved February 11, 1854 (Ga. L. 1854, p. 281), which abolished the office of solicitor of the City Court of Savannah, now the State Court of Chatham County, and transferred responsibility for the prosecution of criminal cases in said court to the solicitor general (now the district attorney) for the Eastern Judicial Circuit is confirmed. It shall be the duty of said district attorney to prosecute all criminal actions in said state court until otherwise specifically provided by law."

Ga. L. 1996, p. 748, § 28, not codified by the General Assembly, provides: "The provisions of this Act shall not affect the powers, duties, or responsibilities of the district attorney as successor to the office of solicitor general under the constitution, statutes, and common law of this state as provided by Code Section 15-18-1."

Ga. L. 1996, p. 748, § 29, not codified by

the General Assembly, provides: "Except as otherwise authorized in this Act, on and after July 1, 1996, any reference in general law or in any local Act to the solicitor of a state court shall mean and shall be deemed to mean the solicitor-general of such state court."

Ga. L. 1996, p. 748, § 30, not codified by the General Assembly, provides: "The provisions of paragraph (3) of Code Section 15-18-62, relating to the qualifications for the office of solicitor-general of a state court, shall apply to any person elected or appointed to such office after July 1, 1996. Any person holding such office on July 1, 1996, may continue to hold such office for the remainder of the term to which such person was elected or appointed notwithstanding the fact that such person has not been a member of the State Bar of Georgia for three years if such person is otherwise qualified to hold the office of solicitor-general."

## ARTICLE 5

### AWARDING EARNED-TIME ALLOWANCES

#### **42-5-100. Termination of board's power to award earned-time allowances.**

The earned-time allowances, which could have been awarded by the board to inmates based upon the performance of the inmate, in effect on December 31, 1983, shall not apply to:

(1) Those persons who commit crimes on or after January 1, 1984, and who are subsequently convicted and sentenced to the custody of the board;

(2) Those persons who have committed a crime prior to January 1, 1984, but who have not been convicted and sentenced as of December 31, 1983, and who are subsequently sentenced to the custody of the board, including those whose sentences have been probated or suspended, on or after January 1, 1984; however, such persons shall receive the full benefit of the earned-time allowances, in effect on December 31, 1983, and shall receive a release or discharge date computed as if they had been sentenced to the custody of the board, prior to December 31, 1983; or

(3) Those persons previously sentenced to the custody of the board, including those whose sentences have been probated or suspended, as of December 31, 1983; however, such persons shall receive the full benefit of the earned-time allowances in effect on December 31, 1983, and shall receive a release or discharge date the same as reflected in the records of such person on December 31, 1983, less any creditable earned time that



such person could have earned as a result of forfeited earned time. (Code 1981, § 42-5-100, enacted by Ga. L. 1983, p. 1340, § 2; Ga. L. 1984, p. 22, § 42.)

**Cross references.** — Earned time allowance for persons sentenced for a misdemeanor of a high and aggravated nature, § 17-10-4.

**Editor's notes.** — Ga. L. 1983, p. 1340, § 2, effective January 1, 1984, deleted the prior version of this Code section, which enumerated the powers of the board regarding granting of earned-time allowances, and

enacted the present language. The prior Code section was based on Ga. L. 1976, p. 949, § 2; Ga. L. 1978, p. 985, §§ 2-4; and Ga. L. 1980, p. 2002, § 1.

**Law reviews.** — For note, "Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia," see 8 Ga. L. Rev. 919 (1974).

## JUDICIAL DECISIONS

### ANALYSIS

#### DECISIONS PRIOR TO 1983 AMENDMENT DECISIONS UNDER PRIOR LAW

##### Decisions Prior to 1983 Amendment

**Where an inmate's good-time is forfeited,** the following constitutionally minimum procedures are required: (1) a hearing; (2) written notice of the charges served at least 24 hours in advance of the hearing; and (3) a written report of the hearing setting out the reasons for the action taken and the evidence relied on. The prisoner may be permitted to call witnesses and present evidence consistent with the needs of the institution. There is no constitutional right to confrontation, cross-examination, or counsel. *Story v. Ault*, 238 Ga. 69, 230 S.E.2d 875 (1976).

**Where disciplinary actions are taken against a prisoner,** the Constitution requires only that the hearing be held before final disciplinary action is taken and final forfeiture occurs. *Story v. Ault*, 238 Ga. 69, 230 S.E.2d 875 (1976).

**Section as to punishment for aggravated misdemeanors not repealed.** — This section and § 42-5-101 (now repealed) did not repeal by implication § 17-10-4 (relating to punishment for misdemeanors of a high and aggravated nature). *Sutton v. Garmon*, 245 Ga. 685, 266 S.E.2d 497 (1980).

**Jurisdiction of court over good-time allowances.** — A sentence of confinement for a period of two years is fully served at the time the executive department releases the prisoner, and any attempt by a court to impose its will over the executive department as to

what constitutes service of a period of confinement would be a nullity and constitute an exercise of power granted exclusively to the executive department. *Johns v. State*, 160 Ga. App. 535, 287 S.E.2d 617 (1981).

**Applying federal system service toward state good-time allowances.** — Defendant's service under federal system, during which time he was serving a four-year probated sentence imposed by state superior court, did not enable him to earn statutory good-time and extra good-time allowances toward his probated state sentence. *Wellons v. State*, 164 Ga. App. 100, 296 S.E.2d 397 (1982).

**Trial for offense of escape.** — Even though a prisoner is not tried for the statutory offense of escape in the courts, he may be found guilty by the Department of Corrections. *Story v. Ault*, 238 Ga. 69, 230 S.E.2d 875 (1976).

**Cited in** *Balkcom v. Heptinstall*, 152 Ga. App. 539, 263 S.E.2d 275 (1979).

##### Decisions Under Prior Law

**Editor's notes.** — In light of the similarity of the issues dealt with under the provisions, decisions under former Penal Code 1910, § 1221 and under Ga. L. 1956, p. 161, as it read prior to revision by Ga. L. 1976, p. 949, § 1 are included in the annotations for this Code section.

**Two sentences served concurrently.** — Where a person was convicted of two felonies, and served his sentences concurrently,

so that he was entitled to be released upon termination of the longer sentence, he could not have such term reduced on account of good conduct by calculating an allowance for good conduct on each of the two sentences, and deducting the aggregate time from the longer sentence. *Chattahoochee Brick Co. v. Goings*, 135 Ga. 529, 69 S.E. 865, 1912A Ann. Cas. 263 (1910).

**When prisoner entitled to extra good-time credit.** — One is only entitled to extra good time if he is a “deserving and exemplary” prisoner, and only then in accordance with the rules and regulations of the Board of Corrections. *Balkcom v. Sellers*, 219 Ga. 662, 135 S.E.2d 414 (1964).

**The granting and taking of good time is an administrative action.** — The action is upon sentences then being served and does not relate to the imposition of a sentence after conviction. *Potts v. State*, 134 Ga. App. 512, 215 S.E.2d 276 (1975).

**Judicial authority as to amount of good-time allowance.** — Judge has no authority to say what good-time or extra good-time allowance a prisoner shall be given, as the law vests that authority in the Board of Corrections for prisoners under its jurisdiction. *Grimes v. Stewart*, 222 Ga. 713, 152 S.E.2d 369 (1966).

**Where an inmate's good time is forfeited** the following constitutionally minimum procedures are required: (1) a hearing; (2) written notice of the charges served at least

24 hours in advance of the hearing; and (3) a written report of the hearing setting out the reasons for the action taken and the evidence relied on. The prisoner may be permitted to call witnesses and present evidence consistent with the needs of the institution. There is no constitutional right to confrontation, cross-examination, or counsel. *Story v. Ault*, 238 Ga. 69, 230 S.E.2d 875 (1976).

**Where disciplinary actions are taken against a prisoner,** the Constitution requires only that the hearing be held before final disciplinary action is taken and final forfeiture occurs. *Story v. Ault*, 238 Ga. 69, 230 S.E.2d 875 (1976).

**Forfeiture of good-time allowance because of escape.** — Punishment by forfeiture of good-time allowances for escape is executive punishment and does not prevent prosecution for the same offense in a court of law. *Mincey v. Hopper*, 233 Ga. 378, 211 S.E.2d 283 (1974).

There is no merit in the contention that an appellant's good-time allowance could not be forfeited because of his escape without his trial in a court of law for the crime of escape. *Mincey v. Hopper*, 233 Ga. 378, 211 S.E.2d 283 (1974).

**A probationer is not a prisoner within meaning of section** and, therefore, one serving a sentence on probation is not entitled as a matter of law to statutory or extra good-time allowances. *Balkcom v. Gaulding*, 216 Ga. 410, 116 S.E.2d 545 (1960).

## OPINIONS OF THE ATTORNEY GENERAL

### ANALYSIS

#### GENERAL CONSIDERATION

##### OPINIONS PRIOR TO 1983 AMENDMENT

#### General Consideration

**Editor's notes.** — In light of the similarity of the issues dealt with, opinions under Ga. L. 1956, p. 161, as it read prior to revision by Ga. L. 1976, p. 949, §§ 1, 2 are included in the annotations for this Code section.

**Fundamental public policy underlying section** is orderly administration of penitentiary service of prisoners, which is enhanced by a system of rewards in which the prisoner participates through a reduction of time served; the state also benefits through a

lessening of ever constant discipline problems. The state receives no benefit by awarding statutory good time to an individual not “in any prison or county public works camp (now county correctional institution) operated under the jurisdiction of the board.” This section was passed to benefit both the state and the prisoner. Since the state is not benefited directly when the prisoner is not under the jurisdiction of the board, the application of the provision dealing with statutory good time would be unauthorized. 1963-65 Op. Att’y Gen. p. 143.



**General Consideration (Cont'd)**

**Effect on powers of State Board of Pardons and Parole.** — This section, which terminates the power of the Board of Offender Rehabilitation (Corrections) to provide for earned-time allowances for inmates under its supervision or custody, has no effect on the powers of the State Board of Pardons and Paroles to grant earned time to persons serving their sentences on parole or other conditional release, and further has no effect on the board's authority to withhold or to forfeit, in whole or in part, any such earned-time allowances. 1984 Op. Att'y Gen. No. 84-7.

**Earned-time credit by one sentenced before December 31, 1983 and paroled on January 31, 1984.** — See 1986 Op. Att'y Gen. No. 86-7.

**Opinions Prior to 1983 Amendment**

**The legislative intent behind this section** is to provide for the uniform computation of sentences; therefore, an inmate who is held by a county, pending the appeal of a felony conviction, should benefit from the earned-time provisions in the computation of his release date. 1978 Op. Att'y Gen. No. U78-46.

**Sheriff responsible for calculating sentences.** — As a natural concomitance of the duties imposed under §§ 42-4-1, 42-4-4, and former subsection (d) of this section, the sheriff would be responsible for calculating sentences of felony prisoners held in the county jail pending appeal, and would be the appropriate discharging authority should a sentence expire before a prisoner is transferred to the custody of state authorities. 1978 Op. Att'y Gen. No. U78-46.

**Youthful offender may be classified as habitual offender.** — Inmate sentenced under Youthful Offender Act (Ch. 7 of this title) may also be classified as a habitual offender under this section for purposes of sentence computation. Further, in the rare case where a youthful offender is also classified as a habitual offender, earned-time adjustment for habitual offenders should be used in computing offender's unconditional release date. 1981 Op. Att'y Gen. No. 81-62.

**There are two types of "earned time":** "parole earned time" granted by the State Board of Pardons and Paroles pursuant to its

rules and regulations, and "incarcerated earned time" granted by the Department of Offender Rehabilitation (Corrections) pursuant to its rules and regulations. 1980 Op. Att'y Gen. No. 80-113.

**Awarding of earned time against probated sentence** would frustrate intent of sentencing judge who has made a previous judicial determination under §§ 17-10-1 and 42-8-34 that the particular individual should be subject to a specific period of supervision and control while he is being reintegrated into society. 1982 Op. Att'y Gen. No. 82-58.

**Felons confined in county jail.** — The crediting of earned time to misdemeanants confined to county correctional facilities under former subsection (d), applied in the situation where a felon was sentenced to confinement in a county jail as a condition of probation. 1982 Op. Att'y Gen. No. U82-47.

**Prerequisite for computation of good-time allowances and deductions.** — With the limited exception of § 42-6-5 relating to temporary custody of convicted inmates in county facilities, good-time allowances and deductions therefrom can only be computed when inmates are under the jurisdiction and control of the institutions operated by the Department of Offender Rehabilitation (Corrections); moreover, with the limited exception of § 42-6-5, neither sheriffs nor the department can take jail credit away from inmates who have misbehaved in jails prior to their being sent to correctional institutions. 1972 Op. Att'y Gen. No. 72-61.

**Penal systems not operated by board.** — The Board of Offender Rehabilitation (Corrections) has authority to adopt a policy under which the commissioner may designate penal systems other than those operated by the board as places of confinement for service of state sentences when concurrent sentences are imposed; this practice would enable a prisoner to earn all possible good time even though not actually serving his sentence in a state institution. 1963-65 Op. Att'y Gen. p. 240.

**Where one has probated sentence to serve upon completion of in-prison time,** probated sentence with its accompanying supervision begins upon discharge of inmate from confinement and continues to run through the period of time originally prescribed for the probated sentence; to allow the inmate to begin his probated sentence when he ordinarily would have been discharged from



his in-prison sentence without the good-time allowances, is to allow the inmate to return to society without the benefit and guidance of supervision and without the help the court needs to become aware of violations by the probationer. 1971 Op. Att'y Gen. No. 71-48.

**Requests for retention of custody of inmate by county probation department.** — Requests from a county probation department for the retention of custody of an inmate pending the arrival of a deputy sheriff or a probation officer must be disregarded by the wardens. 1969 Op. Att'y Gen. No. 69-151.

**Prisoners at Central State Hospital.** — Board of Corrections has the power to promulgate rules and regulations as to good-time allowances which are applicable to prisoners transferred to Central State Hospital due to mental illness. 1975 Op. Att'y Gen. No. 75-146.

**Time spent by felon incarcerated under Department of Human Resources** not to be considered when computing good-time allowances; rather, good time should be computed from the date the felon is received by an institution under the Board of Correc-

tions' jurisdiction. 1975 Op. Att'y Gen. No. 75-78.

Because a sentence begins running from the time of incarceration under the Department of Human Resources, the prisoner must serve one-third of the time to which he has been sentenced, including the time he has spent in the custody of the Department of Human Resources before becoming eligible for parole. 1975 Op. Att'y Gen. No. 75-78.

**Effect of prisoner's acquittal in escape trial.** — The fact that a prisoner was acquitted in a trial on a charge of escape has no legal effect on the authority of the Board of Offender Rehabilitation (Corrections) to deduct from prisoner's good-time allowance for such an escape. 1967 Op. Att'y Gen. No. 67-234.

**Means of computing good-time allowance.** — The word "only" in § 17-10-4 should be read as negating any implication that good-time allowances for persons sentenced under that section should be computed in the same manner as for persons convicted of ordinary misdemeanors under this section. 1972 Op. Att'y Gen. No. 72-138.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 222-235.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 144-153.

**ALR.** — Withdrawal, forfeiture, modification, or denial of good-time allowance to prisoner, 95 ALR2d 1265.

#### 42-5-101. Work incentive credits.

(a) The Department of Corrections is authorized to devise and to provide by agency rule a system of work incentive credits which may be awarded by the department to persons committed to its custody for any felony prison term other than life imprisonment.

(b) Work incentive credits may be awarded by the department to recognize inmates' institutional attainments in academic or vocational education, satisfactory performance of work assignments made by the penal institution, and compliance with satisfactory behavior standards established by the department.

(c) The department may award up to one day of work incentive credits for each day during which the subject inmate has participated in approved educational or other counseling programs, has satisfactorily performed work tasks assigned by the penal institution, and has complied with satisfactory behavior standards established by the department.

(d) Any work incentive credits awarded an inmate by the department shall be reported by the department to the State Board of Pardons and Paroles which shall consider such credits when making a final parole release decision regarding the subject inmate. The department is authorized to recommend the board apply the work incentive credits to advance any tentative parole release date already established for the subject inmate.

(e) The department also shall report to the State Board of Pardons and Paroles the cases of inmates who decline or refuse to participate in work, educational, or counseling programs, who fail to comply with satisfactory behavior standards, and who therefore refuse to earn work incentive credits. (Code 1981, § 42-5-101, enacted by Ga. L. 1992, p. 3221, § 3.)

**Editor's notes.** — Former Code Section 42-5-101, pertaining to the applicability of Code Section 42-5-100 to persons sentenced prior to July 1, 1976, was based on Ga. L. 1956, p. 161, § 24; Ga. L. 1961, p. 127, § 1;

Ga. L. 1964, p. 495, § 1; Ga. L. 1968, p. 1399, § 6; Ga. L. 1976, p. 949, § 1; and Ga. L. 1978, p. 985, § 1, and was repealed by Ga. L. 1983, p. 1340, § 2, effective January 1, 1984.

## CHAPTER 6

## DETAINERS

## Article 1

## General Provisions

Sec.

42-6-6.

Applicability of article to mentally ill persons.

Sec.

42-6-1.

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42-6-2.

When detainees to be accepted and filed by department.

42-6-3.

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42-6-4.

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42-6-24.

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42-6-25.

Escape by person in custody under agreement.

**Administrative rules and regulations.** — Detainers generally, Official Compilation of Rules and Regulations of State of Georgia,

Rules of Georgia Board of Offender Rehabilitation, Chapter 415-2-4.09.

## JUDICIAL DECISIONS

**This chapter does not require the filing of a detainer,** but only states what action is required by an inmate if a detainer is filed. *Riley v. State*, 180 Ga. App. 409, 349 S.E.2d 274 (1986).

**Cited in** *Reed v. State*, 249 Ga. 344, 290 S.E.2d 469 (1982).

## ARTICLE 1

## GENERAL PROVISIONS

## JUDICIAL DECISIONS

**Strict construction.** — Detainer statutes are in derogation of the common law and

must be strictly construed. *Street v. State*, 211 Ga. App. 230, 438 S.E.2d 693 (1993).

## 42-6-1. Definitions.

As used in this article, the term:

- (1) "Commissioner" means the commissioner of corrections.



(2) "Department" means the Department of Corrections.

(3) "Detainer" means a written instrument executed by the prosecuting officer of a court and filed with the department requesting that the department retain custody of an inmate pending delivery of the inmate to the proper authorities to stand trial upon a pending indictment or accusation, or to await final disposition of all appeals and other motions which are pending on any outstanding sentence, and to which is attached a copy of the indictment, accusation, or conviction which constitutes the basis of the request. The request shall contain a statement that the prosecuting officer desires and intends to bring the inmate to trial upon the pending indictment or accusation, and in the case of an outstanding sentence, that he intends to seek final disposition of all appeals and other motions. (Ga. L. 1968, p. 1110, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 1982, p. 1373, §§ 1, 2; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1.)

### JUDICIAL DECISIONS

**Matters constituting "detainer."** — Defendant's admission in his brief that the district attorney filed a letter with the department of corrections stating there was an outstanding warrant for the defendant, and that the State intended to prosecute, substantially complied with the codal definition of a "detainer." *Riley v. State*, 180 Ga. App. 409, 349 S.E.2d 274 (1986).

**Order of court not "detainer."** — An

order issued by the trial court directing the Department of Offender Rehabilitation to produce defendant for arraignment and trial on certain dates was not a detainer, and defendant was not required to follow the procedure outlined in Code Section 42-6-3 for ensuring the trial date after he had filed a demand for speedy trial. *Street v. State*, 211 Ga. App. 230, 438 S.E.2d 693 (1993).

### OPINIONS OF THE ATTORNEY GENERAL

**This section is no more than a definition;** it does not command the filing of a detainer nor any response on the part of the board. 1969 Op. Att'y Gen. No. 69-410.

**Article not an ex post facto or retroactive law.** 1969 Op. Att'y Gen. No. 69-95.

**Primary purpose of this article** is to aid the prisoner in rendering his future more certain by allowing him to request disposition of outstanding charges against him while he is confined; such a purpose is inconsistent with an authorization to the Board of Offender Rehabilitation (Corrections) to hold the prisoner after his sentence has expired. 1969 Op. Att'y Gen. No. 69-410.

**Applicable to prisoners with appeals pending upon prior convictions.** — While §§ 42-6-1 through 42-6-6 do not specifically mention prisoners with appeals pending upon prior convictions, there is nothing in the statutes which would prohibit either a district attorney or a sheriff from writing the

Board of Offender Rehabilitation (Corrections) that such a situation exists with reference to a prisoner, and from sending an arresting officer with a warrant to pick up the prisoner upon release. 1972 Op. Att'y Gen. No. U72-101 (rendered prior to 1982 amendment).

**Detention after expiration of sentence.** — It was not contemplated that the board should have power to hold a prisoner after expiration of his sentence. 1969 Op. Att'y Gen. No. 69-410.

**Request for detention from county probation department.** — As officers and employees of county probation departments are not prosecuting officers of court, requests of county probation department for detention of an inmate on his release date cannot be treated as detainers. 1969 Op. Att'y Gen. No. 69-268.

**A request for the retention of an inmate supported by warrant only** does not consti-

tute filing of a detainer within the meaning of this section. 1969 Op. Att'y Gen. No. 69-23.

**Request for detention and return of inmate in Georgia prison system to county for service of sentence** already imposed and to be served in county work camp (now county correctional institution) is not detainer within the meaning of §§ 42-6-1 through 42-6-6; the same relates solely to requests for the detention of an inmate pending delivery for trial upon pending charges. 1968 Op. Att'y Gen. No. 68-502.

**Recourse in lieu of detainer.** — Although the detainer procedure may be invoked by an accusation without a waiver of indictment by grand jury, this procedure will not authorize the Board of Offender Rehabilitation (Corrections) to hold a prisoner after his sentence has expired; the district attorney can arrest the prisoner upon his release and proceed against the prisoner as he would proceed against any other criminal defendant. 1969 Op. Att'y Gen. No. 69-410.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 148-151.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, §§ 135, 136.

#### **42-6-2. When detainers to be accepted and filed by department.**

The department shall accept and file only those detainers which meet the requirements of this article and which are filed in accordance with this article; provided, however, this article shall not apply to detainers filed by the authorities of the United States government or of any of the other several states or of any foreign state. (Ga. L. 1968, p. 1110, § 1.)

#### **42-6-3. Time limit for trial; notice and request for final disposition; notification of inmate and interested parties; effect of escape by inmate.**

(a) Whenever a person has entered upon a term of imprisonment in a penal institution under the jurisdiction of the department and whenever during the continuance of the term of imprisonment there is pending in any court in this state any untried indictment or accusation on the basis of which a detainer has been filed against such an inmate, he shall be brought to trial within two terms of court after he has caused to be delivered to the prosecuting officer and the clerk of the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request that a final disposition be made of the indictment or accusation; provided, however, that, for good cause shown in open court, the inmate or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the inmate shall be accompanied by a certificate of the department stating the term of commitment under which the inmate is being held, the computed expiration date of the commitment, and the time of parole eligibility of the inmate.

(b) The written notice and request for final disposition referred to in subsection (a) of this Code section shall be given or sent by the inmate to

the commissioner who shall promptly forward it, together with the certificate referred to in subsection (a) of this Code section, to the appropriate prosecuting officer and court by registered or certified mail.

(c) Within 15 days, the warden, superintendent, or other official having physical custody of the inmate shall inform him of the source and furnish him with a copy of the contents of any detainer filed against him and shall also inform him of his right to make a request for a final disposition of the indictment or accusation upon which the detainer is based.

(d) Any request for final disposition of a pending indictment or accusation made by an inmate pursuant to subsection (a) of this Code section shall operate as a request for final disposition of all untried indictments or accusations on the basis of which detainees have been filed against the inmate from the county to whose prosecuting official the request for a final disposition is specifically directed. The commissioner shall promptly notify all interested prosecuting officers and courts in the several jurisdictions within the county to which the inmate's request for final disposition is being sent of the proceeding being initiated by the inmate. Notification sent pursuant to this subsection shall be accompanied by copies of the inmate's written notice and request and by the certificate. If trial is not had on any indictment or accusation upon which a detainer has been based within two terms of court after the receipt by the appropriate prosecuting officers and court of the inmate's request for final disposition, provided no continuance has been granted, all detainees based upon such pending indictments or accusations shall be stricken and dismissed from the records of the department.

(e) Escape from custody by an inmate subsequent to his execution of the request for a final disposition of any pending indictment or accusation shall automatically void the request for final disposition and the same shall be stricken and dismissed from the records of the department. (Ga. L. 1968, p. 1110, § 1; Ga. L. 1982, p. 3, § 42.)

**Cross references.** — Demand for trial generally, § 17-7-170 et seq.

### JUDICIAL DECISIONS

**Defendants serving time outside of state.** — This section has no application to a defendant who is serving in a penal institution outside of the state and not under the jurisdiction of the Board of Corrections. *Butler v. State*, 126 Ga. App. 22, 189 S.E.2d 870 (1972).

**Speedy trial.** — Where the defendant is not within the purview of subsection (a) of this section, nor does the record show compliance with §§ 17-7-170, 17-8-21, or 17-8-33,

he is not denied the right to a speedy trial within the meaning of Ga. Const. 1983, Art. I, Sec. I, Para. XI or U.S. Const., Art. VI, when his trial is delayed after he withdraws his guilty plea. *Butler v. State*, 126 Ga. App. 22, 189 S.E.2d 870 (1972).

An order issued by the trial court divesting the Department of Offender Rehabilitation to produce defendant for arraignment and trial on certain dates was not a detainer and defendant was not required to follow the



procedure authorized in this section for ensuring the trial date after he had filed a demand for speedy trial. *Street v. State*, 211 Ga. App. 230, 438 S.E.2d 693 (1993).

**Trial requirement not actuated by demand for trial.** — Where the defendant freely admitted to the trial court that he made no demand for a speedy trial or disposition of his indictment to the appropriate authorities, the requirement that “an inmate ... shall be brought to trial within two terms of

court” was never actuated by a demand for trial. *Riley v. State*, 180 Ga. App. 409, 349 S.E.2d 274 (1986).

**Sanction for violating subsection (a).** — The only sanction provided for the state’s failure to comply with the requirements of subsection (a) is that the detainees based upon pending indictments or accusations shall be stricken or dismissed. *Quick v. State*, 198 Ga. App. 353, 401 S.E.2d 758 (1991).

### RESEARCH REFERENCES

**ALR.** — What justifies escape or attempt to escape, or assistance in that regard, 70 ALR2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 ALR3d 678.

#### 42-6-4. Effect of failure to meet time limit for trial after delivery of inmate pursuant to Code Section 24-10-60.

If an inmate is not brought to trial upon a pending indictment or accusation within two terms of court after delivery of the inmate to the sheriff or a deputy sheriff pursuant to subsection (a) of Code Section 24-10-60, provided no continuance has been granted, all detainees based upon the pending indictments or accusations shall be stricken and dismissed from the records of the department. (Ga. L. 1968, p. 1110, § 1.)

**Cross references.** — Demand for trial generally, § 17-7-170 et seq.

### OPINIONS OF THE ATTORNEY GENERAL

**This article not an ex post facto or retroactive law.** 1969 Op. Att’y Gen. No. 69-95.

**The primary purpose of this article** is to aid the prisoner in rendering his future more certain by allowing him to request the disposition of outstanding charges against him while he is confined; such a purpose is inconsistent with an authorization to the

Board of Offender Rehabilitation (Corrections) to hold the prisoner after his sentence has expired. 1969 Op. Att’y Gen. No. 69-410.

**Detaining prisoner after expiration of sentence.** — It was not contemplated that the board should have power to hold a prisoner after the expiration of his sentence. 1969 Op. Att’y Gen. No. 69-410.

#### 42-6-5. Temporary custody of inmate requesting disposition of pending indictment or accusation.

(a) In response to the request of an inmate for final disposition of any pending indictment or accusation made pursuant to Code Section 42-6-3 or pursuant to an order of a court entered pursuant to subsection (a) of Code Section 24-10-60, the department shall offer to deliver temporary custody of the inmate to the sheriff or a deputy sheriff of the county in which the indictment or accusation is pending against the inmate. The judge of the

court in which the proceedings are pending is authorized to and shall issue an ex parte order directed to the department requiring the delivery of the inmate to the sheriff or a deputy sheriff of the county in which the trial is to be held.

(b) The sheriff or a deputy sheriff of a county accepting temporary custody of an inmate shall present proper identification and a certified copy of the indictment or accusation upon which trial is to be had.

(c) If the sheriff or deputy sheriff fails or refuses to accept temporary custody of the inmate, detainers based upon indictments or accusations upon which trial has been sought shall be stricken and dismissed from the records of the department.

(d) The temporary custody referred to in this article shall be only for the purpose of permitting prosecution on the pending indictments or accusations which form the basis of the detainer or detainers filed against the inmate.

(e) At the earliest practicable time consonant with the purposes of this article, the inmate shall be returned by the sheriff or a deputy sheriff to the custody of the department.

(f) During the continuance of temporary custody or while the inmate is otherwise being made available for trial as required by this article, the sentence being served by the inmate shall continue to run and good time shall be earned by the inmate to the same extent that the law allows for any other inmate serving under the jurisdiction of the department.

(g) From the time that the sheriff or a deputy sheriff receives custody of an inmate pursuant to this article and until the inmate is returned to the physical custody of the department, the county to which the inmate is transported shall be responsible for the safekeeping of the inmate and shall pay all costs of transporting, caring for, keeping, and returning the inmate. Any habeas corpus action instituted by the inmate while in the custody of the sheriff shall be defended by the county attorney and the expenses of such litigation shall be paid by the county. (Ga. L. 1968, p. 1110, § 1; Ga. L. 1969, p. 606, § 1; Ga. L. 1982, p. 3, § 42.)

**Cross references.** — Demand for trial generally, § 17-7-170 et seq.

### JUDICIAL DECISIONS

**Cited in** Westbrook v. Zant, 575 F. Supp. 186 (M.D. Ga. 1983).

## OPINIONS OF THE ATTORNEY GENERAL

**Computation of good-time allowances and deductions.** — With the limited exception of this section relating to temporary custody of convicted inmates in county facilities, good-time allowances and deductions therefrom can only be computed when inmates are under the jurisdiction and control of the institutions operated by the Department of

Offender Rehabilitation (Corrections); moreover, with the limited exception of this section, neither sheriffs nor the department can take jail credit away from inmates who have misbehaved in jails prior to their being sent to correctional institutions. 1972 Op. Att'y Gen. No. 72-61.

### 42-6-6. Applicability of article to mentally ill persons.

This article shall not apply to any person who has been adjudged to be mentally ill. (Ga. L. 1968, p. 1110, § 1.)

**Cross references.** — Examination, treatment, hospitalization of mentally ill persons generally, Ch. 3, T. 37.

## ARTICLE 2

### INTERSTATE AGREEMENT ON DETAINEES

#### JUDICIAL DECISIONS

**Congressional intent.** — Congress has provided in this article an efficient and effective method for resolving a prisoner's claim that he has been denied a speedy trial and is, therefore, subject to an illegal detainer. Requiring resort to remedies under this article will remove the necessity of intervention by the federal courts, furthering the established principle of comity between state and federal courts. *Hurst v. Hogan*, 435 F. Supp. 125 (N.D. Ga. 1977).

**Right to a speedy trial.** — This article is designed to provide the right to a speedy trial for defendants who are not subject to the judicial power of the state having an untried indictment. The agreement has provisions for sanctions if a speedy disposition of the pending indictment is not effected. If trial is not held within 120 days of the arrival of the movant within the jurisdiction of the court in which the indictment is pending and before the movant is returned to the jurisdiction of the sending state, the untried indictment shall be dismissed with prejudice. *Hunt v. State*, 147 Ga. App. 787, 250 S.E.2d 517 (1978).

The purpose of this article is to ensure speedy trial on pending charges before

staleness and difficulty of proof set it. These are pretrial, and not sentencing, considerations. *Suggs v. Hopper*, 234 Ga. 242, 215 S.E.2d 246 (1975); *Bernyk v. State*, 182 Ga. App. 329, 355 S.E.2d 753 (1987).

Where the defendant applies for a speedy trial under the provisions of § 17-7-170 and cannot procedurally seek a speedy trial under that section because he is not physically present or within the subpoena power of the Georgia courts, his right to a speedy trial must be determined under this article if it was utilized to secure his trial. *Johnson v. State*, 154 Ga. App. 512, 268 S.E.2d 782 (1980).

**Invocation of article by nonpresent defendant.** — In order for a demand for trial pursuant to the provisions of § 17-7-170 to serve as the predicate for an absolute acquittal because of the failure of compliance therewith, it is necessary that the filing comply with the provisions of that statute, but defendant who is not able to satisfy § 17-7-170 and thus not available to pursue his remedy in the appropriate state court is still not without remedy, since he can invoke the provisions of this article. *Luke v. State*, 180 Ga. App. 378, 349 S.E.2d 391 (1986),



overruled on other grounds, *State v. Collins*, 201 Ga. App. 500, 411 S.E.2d 546 (1991).

**Prerequisite to seeking habeas corpus.** — Where a prisoner in federal custody seeks to challenge a detainer lodged against him by officials of a state other than that in which he is incarcerated, the prisoner must exhaust his remedies under this article before seeking federal habeas corpus. *Hurst v. Hogan*, 435 F. Supp. 125 (N.D. Ga. 1977).

**Comity between states.** — A state need not reduce a capital sentence authorized under its own laws because of the effects of another state's judicial processes, brought about by operation of this article. *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979).

**Cited in** *Sassoon v. Stynchombe*, 654 F.2d 371 (5th Cir. 1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 151.

**ALR.** — Validity, construction, and appli-

cation of interstate agreement on detainers, 98 ALR3d 160.

## 42-6-20. Enactment and text of agreement.

The Agreement on Detainers is enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows:

The contracting states solemnly agree that:

### ARTICLE I.

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, information or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

### ARTICLE II.

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

### ARTICLE III.

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint, provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by the certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be

accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

#### ARTICLE IV.

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall



furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

#### ARTICLE V.

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given;

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been

lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

#### ARTICLE VI.

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time

periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

#### ARTICLE VII.

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

#### ARTICLE VIII.

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

#### ARTICLE IX.

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the Constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the Constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (Ga. L. 1972, p. 938, § 1.)

### JUDICIAL DECISIONS

#### ANALYSIS

##### GENERAL CONSIDERATION

##### CONSTITUTIONALITY

##### INITIATING DETAINING PROCEEDINGS

1. ARTICLE III
2. ARTICLE IV
3. ARTICLE V

##### General Consideration

**Applicability.** — This article by its terms relates only to an untried indictment, infor-

mation, or complaint, and does not apply to warrants for arrest for probation violation. *Suggs v. Hopper*, 234 Ga. 242, 215 S.E.2d 246 (1975).



### General Consideration (Cont'd)

This article by its terms relates only to an untried indictment, information, or complaint, and does not apply to warrants for arrest for armed robbery. *Newt v. State*, 190 Ga. App. 301, 379 S.E.2d 11 (1989).

This article does not address itself to transfers from the receiving jurisdiction back to the sending jurisdiction either after trial or after sentencing. *State v. Sassoon*, 240 Ga. 745, 242 S.E.2d 121 (1978).

**Effect of failure to comply with article.** — Where the appellant failed to comply with the requirements of this article it renders his request for trial invalid. *Greathouse v. State*, 156 Ga. App. 491, 274 S.E.2d 835 (1980).

Where an escapee from a Florida prison committed crimes in Georgia, before being caught and returned to Florida, and was indicted in Georgia but did not comply with the procedures under this section to trigger the 180-day rule, he was not denied a speedy trial. *Cothern v. State*, 195 Ga. App. 513, 393 S.E.2d 763 (1990).

**Cited in** *Duchac v. State*, 151 Ga. App. 374, 259 S.E.2d 740 (1979); *Johnson v. State*, 154 Ga. App. 512, 268 S.E.2d 782 (1980); *Sassoon v. Stynchombe*, 654 F.2d 371 (5th Cir. 1981); *Reed v. State*, 249 Ga. 344, 290 S.E.2d 469 (1982); *Inman v. State*, 191 Ga. App. 497, 382 S.E.2d 122 (1989); *Ricks v. State*, 204 Ga. App. 441, 419 S.E.2d 517 (1992).

### Constitutionality

**Constitutionality of lodging detainer.** — The lodging of a detainer by the proper officials of this state against a person serving a term of imprisonment in the correctional institution of a sister state does not violate the provisions of U.S. Const., Amendments six, eight and fourteen or Ga. Const. 1945, Art. I, Sec. I, Para. V (see Ga. Const. 1983, Art. I, Sec. I, Para. XI). *Pollard v. State*, 128 Ga. App. 470, 197 S.E.2d 158 (1973).

### Initiating Detaining Proceedings

#### 1. Article III

**One hundred eighty-day provision not inflexible.** — This agreement does not contemplate that the 180-day provision is inflexible. *Duchac v. State*, 151 Ga. App. 374, 259 S.E.2d 740 (1979).

A holding that the state may ignore a prisoner's request until shortly before the expiration of the 180-day period provided in Article III, and then extend that period by initiating proceedings under Article IV, would effectively nullify the purpose of the 180-day provision of Article III and deny to a prisoner the right to a speedy trial. *Duchac v. State*, 151 Ga. App. 374, 259 S.E.2d 740 (1979).

**Delay in bringing defendant to trial.** — Where any delay in bringing defendant to trial within the time prescribed by Art. III(a) was precipitated by defendant's agreement to a joint recommendation, the defendant cannot complain that he was not brought to trial in a timely manner. *Smith v. State*, 202 Ga. App. 362, 414 S.E.2d 504 (1991), cert. denied, 202 Ga. App. 907, 414 S.E.2d 504 (1992).

**Failure to begin trial within time limit.** — Article III does not say that the untried indictment shall be dismissed if the prisoner is not brought to trial within 180 days after he has served his request for final disposition upon the proper Georgia authorities. *Price v. State*, 237 Ga. 352, 227 S.E.2d 368 (1976).

**Strict compliance with notice provisions required.** — Facsimile transmission of defendant's request for final disposition was insufficient as a matter of law since it was required to be sent by registered or certified mail. *Clater v. State*, 266 Ga. 511, 467 S.E.2d 537 (1996).

**Defendant's direct notice of disposition.** — Where defendant sent his request for a disposition of the charges directly to the state without a warden's certificate of an inmate's status, rather than through prison authorities, and the required certificate was eventually supplied at a later date, the 180-day period provided in Article III began to run once the state received the certificate rather than when the state received the defendant's direct request. *Thompson v. State*, 186 Ga. App. 379, 367 S.E.2d 247, cert. denied, 186 Ga. App. 919, 367 S.E.2d 247 (1988).

**Where guilt not questioned, no relief for violation.** — A violation of the speedy trial provision (Article III(a)) will support no post-conviction relief pursuant to 28 U.S.C. § 2254 when the petitioner alleges no facts casting substantial doubt on the state trial's

reliability on the question of guilt. *Seymore v. Alabama*, 846 F.2d 1355 (11th Cir. 1988), cert. denied, 488 U.S. 1018, 109 S. Ct. 816, 102 L. Ed. 2d 806 (1989).

**Foreign jurisdiction's delay not dispositive.** — Where defendant was tried within 180 days after the requisite documents were filed with all entities required by this section and where the initial failure to forward the detainer demand to the proper court was the result of a mistake by out-of-state authorities, there was no violation of this section. *Parrott v. State*, 206 Ga. App. 829, 427 S.E.2d 276 (1993).

## 2. Article IV

**Grace period inapplicable where U.S. government a sending state.** — The 30-day rule in paragraph (a) of Article IV which provides for a period of 30 days after a request for temporary custody or availability before such request be honored, would appear to be inapplicable where the United States government is the sending state. *Keaves v. State*, 242 Ga. 542, 250 S.E.2d 376 (1978), overruled on other grounds, *Felker v. State*, 252 Ga. 351, 314 S.E.2d 621 (1984).

**Tacking time limits of Articles III and IV not permitted.** — The 120-day provisions of Article IV may not be added to the 180-day provisions of Article III, once a proper request under Article III has been made by the prisoner. *Duchac v. State*, 151 Ga. App. 374, 259 S.E.2d 740 (1979).

**Tolling time limit.** — Court was authorized to find that the 120-day time limit of this section was tolled by delay occasioned by the appellant's numerous pretrial motions, in the face of the state's good-faith efforts to expedite the trial. *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979).

**Missing 120-day limit by one week.** — Defendant could not complain that the state missed by one week beginning his trial within 120 days of his return to Georgia, where a trial date had been set with the agreement of defendant's attorney, defendant was returned to Georgia earlier than anticipated and then filed over 60 motions

which necessarily had to be determined before trial, and defendant did not raise any objections to the date set for trial until one day after the 120-day period had elapsed. *Moon v. State*, 258 Ga. 748, 375 S.E.2d 442 (1988), cert. denied, 499 U.S. 982, 111 S. Ct. 1638, 113 L. Ed. 2d 733 (1991), rev'd on other grounds sub nom. *Zant v. Moon*, 264 Ga. 93, 440 S.E.2d 657 (1994).

**Right to pretransfer hearing.** — A prisoner incarcerated in a jurisdiction that has adopted the Uniform Criminal Extradition Act is entitled to the procedural protections of that Act, particularly the right to a pretransfer hearing before being transferred to another jurisdiction, pursuant to Art. IV of the Detainer Agreement. *Lambert v. Jones*, 250 Ga. 603, 299 S.E.2d 716 (1983).

**Extent of proper inquiries.** — Proper inquiries at pretransfer hearings are limited to whether the extradition documents on their face are in order; whether the petitioner has been charged with a crime in the demanding state; whether the petitioner is the person named in the request for extradition; and whether the petitioner is a fugitive. *Lambert v. Jones*, 250 Ga. 603, 299 S.E.2d 716 (1983).

## 3. Article V

**Effect of issuance of habeas corpus writ.** — Once a detainer has been lodged against a prisoner and he has been removed from his original place of imprisonment to the receiving state, the issuance of a writ of habeas corpus ad prosequendum to compel his presence at trial is a request for temporary custody within the meaning of this section. *Reaves v. State*, 242 Ga. 542, 250 S.E.2d 376 (1978), overruled on other grounds, *Felker v. State*, 252 Ga. 351, 314 S.E.2d 621 (1984).

**Denial of speedy trial.** — In a habeas corpus hearing to avoid extradition, the question whether a petitioner was denied a speedy trial by the demanding state is not an appropriate one for adjudication by the asylum state. *Gilstrap v. Wilder*, 233 Ga. 968, 213 S.E.2d 895 (1975).

**42-6-21. Meaning of phrase "appropriate court."**

The phrase "appropriate court," as used in the Agreement on Detainers with reference to the courts of this state, means the superior courts of this state. (Ga. L. 1972, p. 938, § 2.)

**42-6-22. Enforcement of agreement; cooperation with other states.**

All courts, departments, agencies, officers, and employees of this state and its political subdivisions are directed to enforce the Agreement on Detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose. (Ga. L. 1972, p. 938, § 3.)

**42-6-23. Appointment of central administrator and information agent.**

The commissioner of corrections shall appoint a person to serve as central administrator of and information agent for the Agreement on Detainers pursuant to Article VII of the agreement. (Ga. L. 1972, p. 938, § 6; Ga. L. 1979, p. 652, § 1; Ga. L. 1985, p. 283, § 1.)

**42-6-24. Delivery of inmate mandatory when required by operation of agreement.**

It shall be lawful and mandatory upon the warden, superintendent, or other official in charge of a penal institution in this state to give over the person of any inmate thereof whenever so required by the operation of the Agreement on Detainers. (Ga. L. 1972, p. 938, § 5; Ga. L. 1974, p. 390, § 1.)

**42-6-25. Escape by person in custody under agreement.**

(a) It shall be unlawful for any person to escape from custody while in another state pursuant to the Agreement on Detainers.

(b) A violation of subsection (a) of this Code section shall be punishable by confinement for not less than one nor more than five years. (Ga. L. 1972, p. 938, § 4.)

**RESEARCH REFERENCES**

**ALR.** — What justifies escape or attempt to escape, or assistance in that regard, 70 ALR2d 1430.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 ALR3d 678.

What constitutes "custody" under 18 USC § 751(a) defining offense of escape from custody, 114 ALR Fed. 581.



## TREATMENT OF YOUTHFUL OFFENDERS

### CHAPTER 7

#### TREATMENT OF YOUTHFUL OFFENDERS

Sec.		Sec.	
42-7-1.	Short title.	42-7-6.	Notification of State Board of Pardons and Paroles.
42-7-2.	Definitions.	42-7-7.	Adoption of policies and procedures.
42-7-3.	Providing institutions and facilities.	42-7-8.	Court recommendation of treatment as youthful offender.
42-7-4.	Studies and diagnoses; placement of youthful offender by department.	42-7-9.	Construction of chapter.
42-7-5.	Transfer.		

**Cross references.** — Judicial proceedings involving juveniles, Ch. 11, T. 15. Disposition of deprived, delinquent, and unruly children, as those terms are defined in § 15-11-2, §§ 15-11-34 through 15-11-36. Powers and duties of Department of Human Resources regarding children and youth services, § 49-5-1 et seq.

**Editor's notes.** — Ga. L. 1985, p. 420, effective March 27, 1985, repealed the Code sections formerly codified at this chapter and enacted the current chapter. The former chapter, which also dealt with treatment of youthful offenders, consisted of Code Sections 42-7-1 through 42-7-16. The former chapter also created the Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections) and described that former

division's powers and duties. While several provisions of Code sections of the former chapter were carried forward into the new chapter (see historical citations in this chapter), the following Acts formed the basis of Code sections which were not carried forward: Ga. L. 1972, p. 592, §§ 3, 4, 5, 6, 7, 13, 14; Ga. L. 1975, p. 900, §§ 2, 7; Ga. L. 1978, p. 922, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1.

Section 2 of Ga. L. 1985, p. 420, not codified by the General Assembly, provided that that Act would not operate to deny any rights to any youthful offender currently on probation pursuant to the "Georgia Youthful Offender Act of 1972," but any such person would remain on probation subject to any conditions as previously specified.

#### JUDICIAL DECISIONS

**Effect of previous conviction under this chapter.** — This chapter contains significantly different provisions than the First Offender Act (OCGA § 42-8-60 et seq.); specifically, this chapter does not authorize

the discharge of a felony conviction and such conviction under this chapter may serve as a predicate for sentencing under OCGA § 17-10-7. *Lazenby v. State*, 221 Ga. App. 148, 470 S.E.2d 526 (1996).

#### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — The following opinions were rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections). See the editor's notes under the Chapter 7 heading.

**Classification as habitual offender for sentencing purposes.** — An inmate sentenced under this chapter may also be classified as a habitual offender under § 42-5-100 for purposes of sentence computation. Further, in the rare case where a youthful offender is also classified as a habitual offender,

earned-time adjustment for habitual offenders should be used in computing offender's unconditional release date. 1981 Op. Att'y Gen. No. 81-62.

**Effect of revocation of offender's conditional release.** — When a youthful offender's conditional release is revoked, and he is not returned to the youthful offender program, his status as a youthful offender is terminated and his sentence should be computed on the basis of six years or the maximum term for the offense, if less than six years. 1975 Op. Att'y Gen. No. 75-127.

**When a combination of youthful offender and standard sentences occur,** the Youthful Offender Division may not approve a conditional or unconditional release for the described youthful offender until his concurrent standard sentence has expired; nevertheless, he could be assigned to an

institution maintained primarily for youthful offenders during the entire period for which the board is charged with custody over him, since Ga. L. 1956, p. 161 (see § 42-5-50(b) and § 42-5-51(b), (d)) empowers the board to assign inmates to any institution within its system, and subsection (c) of former § 42-7-8 authorizes the director (now commissioner) of corrections to segregate youthful offenders from other prisoners. 1973 Op. Att'y Gen. No. 73-82.

**The notion of a judicially imposed minimum term of confinement** does not comport with the statutory scheme of this chapter. 1973 Op. Att'y Gen. No. 73-36.

**Earning good-time credit.** — Youthful offenders can earn good-time credit toward the reduction of their period of confinement to the extent provided in this chapter. 1975 Op. Att'y Gen. No. 75-50.

## RESEARCH REFERENCES

**ALR.** — Sex discrimination in treatment of jail or prison inmates, 12 ALR4th 1219.

### 42-7-1. Short title.

This chapter shall be known and may be cited as the "Georgia Youthful Offender Act of 1972." (Ga. L. 1972, p. 592, § 1; Ga. L. 1985, p. 420, § 1.)

## JUDICIAL DECISIONS

**Cited in** Carrindine v. Ricketts, 236 Ga. 283, 223 S.E.2d 627 (1976); Crowley v. State, 141 Ga. App. 867, 234 S.E.2d 700 (1977);

Wilson v. State, 148 Ga. App. 368, 251 S.E.2d 387 (1978); Duncan v. State, 148 Ga. App. 685, 252 S.E.2d 190 (1979).

### 42-7-2. Definitions.

As used in this chapter, the term:

(1) "Board" means the Board of Corrections.

(2) "Commissioner" means the commissioner of corrections.

(3) "Conviction" means a judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere in a felony case but excludes all judgments upon criminal offenses for which the maximum punishment provided by law is death or life imprisonment.

(4) "Court" means any court of competent jurisdiction other than a juvenile court.

(5) "Department" means the Department of Corrections.

(6) "Treatment" means corrective and preventative incarceration, guidance, and training designed to protect the public by correcting the antisocial tendencies of youthful offenders, which may include but is not limited to vocational, educational, and other training deemed fit and necessary by the department.

(7) "Youthful offender" means any male offender who is at least 17 but less than 25 years of age at the time of conviction and who in the opinion of the department has the potential and desire for rehabilitation. (Ga. L. 1972, p. 592, § 2; Ga. L. 1973, p. 581, § 1; Ga. L. 1975, p. 900, § 1; Ga. L. 1985, p. 420, § 1.)

**Code Commission notes.** — Ga. L. 1985, p. 420 used the terms "Offender Rehabilitation" and "offender rehabilitation" in this

Code section. Pursuant to Code Section 28-9-5, they have been changed to "Corrections" and "corrections."

### JUDICIAL DECISIONS

**Cited in** *White v. State*, 137 Ga. App. 9, 223 S.E.2d 24 (1975); *Carrindine v. Ricketts*, 236 Ga. 283, 223 S.E.2d 627 (1976); *Duncan v.*

*State*, 148 Ga. App. 685, 252 S.E.2d 190 (1979).

### 42-7-3. Providing institutions and facilities.

(a) Youthful offenders shall undergo treatment in secure institutions, including training schools, hospitals, farms, and forestry and other camps and including vocational training facilities and other institutions and agencies that will provide the essential varieties of treatment.

(b) The commissioner may, to the extent necessary, set aside such facilities described in subsection (a) of this Code section as are necessary to carry out the purposes of this chapter.

(c) To the extent possible, such institutions and facilities shall be used only for treatment of youthful offenders who have the potential and desire for rehabilitation as provided in this chapter. (Code 1981, § 42-7-3, enacted by Ga. L. 1985, p. 420, § 1.)

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — The following opinions were rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections). See the editor's notes under the Chapter 7 heading.

**Youths transferred from the Department of Human Resources** enjoy a youthful offender status; a parole eligibility date should be established for them, computed on the

basis of a six-year determinate sentence, or the maximum potential term for the offense for which the offender was committed, whichever is less. 1975 Op. Att'y Gen. No. 75-50.

**When a combination of youthful offender and standard sentences occur,** the Youthful Offender Division may not approve a conditional or unconditional release for the described youthful offender until his concurrent standard sentence has expired;



nevertheless, he could be assigned to an institution maintained primarily for youthful offenders during the entire period for which the board is charged with custody over him, since Code 1933, § 77-308(b) (see §§ 42-5-50(b), 42-5-51(b), (d)) empowers

the board to assign inmates to any institution within its system, and subsection (c) of this section authorizes the director (now commissioner) of corrections to segregate youthful offenders from other prisoners. 1973 Op. Att'y Gen. No. 73-82.

#### **42-7-4. Studies and diagnoses; placement of youthful offender by department.**

(a) The commissioner shall cause to be made a complete study and diagnosis of each youthful offender, including a physical examination and, where possible and indicated, a mental examination. In the absence of exceptional circumstances, each study and diagnosis shall be completed within a period of 60 days from the date of commitment.

(b) Upon the receipt of all reports and recommendations required by subsection (a) of this Code section, the department shall:

(1) Allocate and direct a transfer of the youthful offender to an institution or facility for treatment; or

(2) Order the youthful offender confined and afforded treatment under such conditions as are necessary for the protection of the public. (Code 1981, § 42-7-4, enacted by Ga. L. 1985, p. 420, § 1.)

### **JUDICIAL DECISIONS**

**Cited in** *Duncan v. State*, 148 Ga. App. 685, 252 S.E.2d 190 (1979).

### **OPINIONS OF THE ATTORNEY GENERAL**

**Editor's notes.** — The following opinion was rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections). See the editor's notes under the Chapter 7 heading.

**Receipt of report prerequisite to grant of conditional release.** — As soon as the Youth-

ful Offender Division receives the report and recommendation of the director (now commissioner) of corrections described in this section, the division, subject to final approval by the director (now commissioner), has the discretion to grant a conditional release to the youthful offender who is the subject of the report. 1973 Op. Att'y Gen. No. 73-36.

#### **42-7-5. Transfer.**

The commissioner may order the transfer of the offender from one institution or facility to any other institution or facility operated by the department. (Code 1981, § 42-7-5, enacted by Ga. L. 1985, p. 420, § 1.)

### 42-7-6. Notification of State Board of Pardons and Paroles.

After receipt of the reports and recommendations provided for by subsection (a) of Code Section 42-7-4 and the commissioner or his designee has determined whether or not an individual shall receive youthful offender treatment, the State Board of Pardons and Paroles shall be notified. (Code 1981, § 42-7-6, enacted by Ga. L. 1985, p. 420, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — The following decisions were rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections). See the editor's notes under the Chapter 7 heading.

**Limiting duration of sentence.** — Sentencing court does not have authority to limit

duration of sentence under this chapter to less than six years, and sentence for indefinite period not to exceed three years is therefore void. *DeFrancis v. Thompson*, 239 Ga. 785, 239 S.E.2d 14 (1977).

**Cited in** *Duncan v. State*, 148 Ga. App. 685, 252 S.E.2d 190 (1979).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — The following opinions were rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections). See the editor's notes under the Chapter 7 heading.

**Receipt of report prerequisite to grant of conditional release.** — As soon as the Youthful Offender Division receives the report and recommendation of the director (now commissioner) of corrections described in former § 42-7-9, the division, subject to final approval by the director (now commissioner), has the discretion to grant a conditional release to the youthful offender who is the subject of the report. 1973 Op. Att'y Gen. No. 73-36.

**Sentence which purports to order a minimum term of custody** has no binding effect on the Youthful Offender Division; while the division should regard such language as an authoritative recommendation that it postpone the conditional release of a particular youthful offender, the division may deal with that offender in accordance with its normal procedures. 1973 Op. Att'y Gen. No. 73-36.

**Complete discretion in granting a conditional or unconditional release** is given to the

administrators of this chapter within the time limits specified by this chapter. Language in a sentence which would either delay release for a stated period or order it to be granted within a shorter period than that described in former §§ 42-7-11 and 42-7-13 would not be binding on the Youthful Offender Division, but would only have the effect of a recommendation; thus, an individual sentenced to serve one year under this chapter could lawfully remain in the physical custody of the division for a period greater or less than one year. 1973 Op. Att'y Gen. No. U73-60.

Where sentence is expressly imposed under this chapter so that the person is sentenced to be confined in the Youthful Offender Division, language which specifies that the period of custody is not to exceed a period of two years, does not operate to limit the division's discretion over conditional and unconditional release. 1974 Op. Att'y Gen. No. 74-100.

**Any restrictive language in a youthful offender's sentence** should be regarded as a compelling recommendation that the release of the particular offender be approved within the time period specified in his sentence. 1974 Op. Att'y Gen. No. 74-100.

### 42-7-7. Adoption of policies and procedures.

The State Board of Pardons and Paroles shall adopt policies and procedures concerning individuals designated to receive youthful offender treatment. (Code 1981, § 42-7-7, enacted by Ga. L. 1985, p. 420, § 1.)

### 42-7-8. Court recommendation of treatment as youthful offender.

If a court finds that a youthful offender might benefit from this chapter, the court may recommend that a young offender be treated as a youthful offender by indicating the recommendation in writing in the sentence itself. When the judge has recommended in the sentence that a person be given youthful offender treatment, release may be made without regard to limitations placed upon the service of a portion of the prison sentence provided by Code Section 42-9-45. After the offender is evaluated, the department will make the decision concerning the placement of the offender. (Code 1981, § 42-7-8, enacted by Ga. L. 1985, p. 420, § 1.)

**Cross references.** — Sentence and punishment generally, Ch. 10, T. 17. Punishment of misdemeanor first offenders between ages 16 and 18, § 17-10-3(c).

**Law reviews.** — For article on the effect of nolo contendere plea on conviction, see 13 Ga. L. Rev. 723 (1979).

## JUDICIAL DECISIONS

**Editor's notes.** — The following decisions were rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections). See the editor's notes under the Chapter 7 heading.

**Failure to sentence youth under this section.** — Testimony that appellant had been drinking, cursing, wagering, and carrying an offensive weapon is sufficient evidence to show that the trial court did not abuse its discretion when it failed to sentence appellant under the Youthful Offender Act. *Beasley v. State*, 161 Ga. App. 737, 288 S.E.2d 759 (1982).

**Limiting duration of sentence.** — Sentencing court does not have authority to limit duration of sentence under this chapter to less than six years and sentence for indefinite period not to exceed three years was therefore void. *DeFrancis v. Thompson*, 239 Ga. 785, 239 S.E.2d 14 (1977).

**Finding of benefit to defendant.** — It is not necessary for the trial court to make a specific affirmative finding before sentencing that a defendant would receive "no benefit" under this chapter. *Woods v. State*, 233 Ga. 347, 211 S.E.2d 300 (1974), appeal dismissed, 422 U.S. 1002, 95 S. Ct. 2623, 45 L. Ed. 2d 667 (1975).

**Termination of custody by Department of Human Resources.** — This section seems both to accept the view that the Department of Human Resources loses the right to custody at age 17 and that the most suitable place of incarceration is in the Youthful Offender Division of the Department of Offender Rehabilitation (Corrections). *Carrindine v. Ricketts*, 236 Ga. 283, 223 S.E.2d 627 (1976).

**Cited in** *England v. Bussiere*, 237 Ga. 814, 229 S.E.2d 655 (1976); *Crowley v. State*, 141 Ga. App. 867, 234 S.E.2d 700 (1977); *Duncan v. State*, 148 Ga. App. 685 252 S.E.2d 190 (1979).



### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — The following opinions were rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections). See the editor's notes under the Chapter 7 heading.

**Discretion of division in computing length of incarceration.** — An inmate sentenced under this chapter receives indeterminate sentence in custody of Youthful Offender Division of Department of Offender Rehabilitation (Corrections). The division is accorded a great deal of discretion in computing the length of time such an offender shall be incarcerated. 1981 Op. Att'y Gen. No. 81-62.

**Transfer of and computation of offender's term of custody.** — A 16-year-old originally committed to the Department of Human Resources may be transferred on his seventeenth birthday to the Department of Corrections by order of the committing court under the provisions of this chapter; the offender's term of custody should be computed from the date of his original conviction. 1975 Op. Att'y Gen. No. 75-47.

**Effect of language order.** — A court order transferring a 17-year-old to the custody of

the Department of Corrections is merely a modification of the offender's sentence pursuant to a prior judgment of conviction on a verdict of guilty; therefore, the offender's period of custody should be computed from the date of his original conviction. 1975 Op. Att'y Gen. No. 75-47.

**Requirement to commit as youthful offender.** — Where a committing court has expressed its intention in writing to commit an individual as a youthful offender, he has been effectively transferred to the custody of the department under the provisions of this chapter. 1975 Op. Att'y Gen. No. 75-47.

**Placement of kidnapping offenders.** — Kidnapping, not being punishable by death or imprisonment for life, is not an offense which requires the offender under 17 years of age to be placed in the sole custody of the Department of Offender Rehabilitation (Corrections); where the offender under 17 years of age is convicted of kidnapping for ransom or kidnapping in which the victim receives bodily injury, both being offenses punishable by life imprisonment or death, he shall only be sentenced into the custody of the department. 1975 Op. Att'y Gen. No. 75-73.

### 42-7-9. Construction of chapter.

(a) Nothing in this chapter shall limit or affect the power of any court to proceed in accordance with any other applicable provisions of law.

(b) Nothing in this chapter shall be construed in any way to amend, repeal, or affect the jurisdiction of the juvenile court system of this state.

(c) Nothing in this chapter shall be construed in any way to amend, repeal, or affect the jurisdiction of the State Board of Pardons and Paroles. A person sentenced under this chapter shall have his eligibility for parole computed in the same manner as other offenders sentenced to the jurisdiction of the department. (Code 1981, § 42-7-9, enacted by Ga. L. 1985, p. 420, § 1.)

**Cross references.** — Juvenile proceedings generally, Ch. 11, T. 15.

**JUDICIAL DECISIONS**

**Cited** in Woods v. State, 233 Ga. 347, 211 S.E.2d 300 (1974); Duncan v. State, 148 Ga. App. 685, 252 S.E.2d 190 (1979); Beasley v. State, 161 Ga. App. 737, 288 S.E.2d 759 (1982).

**OPINIONS OF THE ATTORNEY GENERAL**

**Editor's notes.** — The following opinion was rendered under former Chapter 7 of this title, relating to the powers and duties of the former Youthful Offender Division of the Department of Offender Rehabilitation (now Department of Corrections). See the editor's notes under the Chapter 7 heading.

**Giving of standard sentence to previous**

**offender by second court.** — Subsection (a) of this section could be read as implicitly recognizing the power of a second court to give a standard prison sentence to a person who had previously been sentenced as a youthful offender. 1973 Op. Att'y Gen. No. 73-82.

## PROBATION

### CHAPTER 8

### PROBATION

#### Article 1

##### Advisory Council for Probation

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- 42-8-2. Duty to consult and advise with Board and Department of Corrections; studies and surveys; recommendations; policy changes; meetings.
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- 42-8-30.1. Applicability to counties establishing probation system pursuant to Code Section 42-8-100.
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- dence and whereabouts; violations; unpaid moneys.
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- 42-8-43. Effect of article on existing county probation systems.
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#### Probation of First Offenders

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#### Participation of Probationers in Community Service Programs

- 42-8-70. Definitions; unlawful to use offender for private gain except under certain circumstances; penalties.
- 42-8-71. Application for participation in community service program; assignment of offenders; violations of court orders or article; limitation of liability.
- 42-8-72. Community service as condition of probation; determination of appropriateness of community service for particular offender; service as live-in attendant for disabled person; community service in lieu of incarceration; community service as discipline.
- 42-8-73. Placement of offender with appropriate agency; scheduling for employed offenders; supervision; evaluation.
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- 42-8-80. Establishment and operation; rules and regulations.
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- 42-8-100. Agreements between chief judges of county courts or judges

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- 42-8-110. Definitions; applicability; purchase or lease of ignition interlock devices by counties, municipalities, or private entities; costs, fees and deposits.
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- 42-8-116. Warning labels.
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#### Article 8

##### Diversion Center and Program

- 42-8-130. Establishment; obligations of respondent; confinement; fee; alternative methods of incarceration.

**Law reviews.** — For article, "A Review of Georgia's Probation Laws," see 6 Ga. St. B.J. 255 (1970).

#### RESEARCH REFERENCES

**ALR.** — Right of convicted defendant to refuse probation, 28 ALR4th 736.

#### ARTICLE 1

##### ADVISORY COUNCIL FOR PROBATION

#### 42-8-1. Creation; composition; selection of members; terms of office.

There is created the Advisory Council for Probation, to be composed of one superior court judge from each of the judicial administrative districts.

The district council for each judicial administrative district shall select a superior court judge who shall be each respective district's member of the council. The initial terms of office of the council members shall be as follows: Districts 1 through 3, one year; Districts 4 through 6, two years; Districts 7 through 10, three years. Thereafter, all successors to the initial members of the council shall serve for terms of office of three years. Members of the advisory council shall be selected by the district councils, meeting in caucus called for such purpose by the administrative judge of each district. (Ga. L. 1980, p. 400, § 1.)

**42-8-2. Duty to consult and advise with Board and Department of Corrections; studies and surveys; recommendations; policy changes; meetings.**

The Advisory Council for Probation shall meet, consult, and advise with the Board of Corrections and the Department of Corrections on questions and matters of mutual concern and interest relative to policy, personnel, and budget which pertain to probationary activities, powers, duties, and responsibilities of the board and the department. The advisory council shall institute such studies and surveys and shall make such recommendations to the board and department as the council deems wise and necessary and which, in the opinion of the council, will improve the effectiveness and efficiency of probation services rendered throughout the state. No change in existing policy of the board or the department relative to probation, if the magnitude of the change will result in a significant impact upon state-wide probationary services, or any such new policy, shall be instituted by the board or department without opportunity being afforded to the advisory council to advise and consult with the board or department on the proposed changes. However, the recommendations of the advisory council shall be advisory only and shall not bind the board or department. The board, the department, and the council shall meet periodically throughout each year for the purpose of improving the administration, efficiency, and effectiveness of probation services. (Ga. L. 1980, p. 400, § 2; Ga. L. 1985, p. 283, § 1.)

**42-8-3. Staff director; reimbursement of members for expenses; operating funds.**

The Advisory Council for Probation is authorized to employ and fix the compensation of a staff director, subject to the appropriation of funds for this position, who shall be responsible to the council and who shall discharge such duties and assignments as shall be assigned to him by the council. Members of the council shall be reimbursed for their actual expenses incurred in connection with the activities and responsibilities of the council. The funds necessary to meet the expenses of the council shall be met from funds appropriated to or otherwise available for the operation of the superior courts. (Ga. L. 1980, p. 400, § 3.)



**Law reviews.** — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

## ARTICLE 2

### STATE-WIDE PROBATION SYSTEM

#### JUDICIAL DECISIONS

**Construction.** — The state-wide probation system is strictly construed in favor of a defendant. *Helton v. State*, 166 Ga. App. 565, 305 S.E.2d 27 (1983).

#### RESEARCH REFERENCES

**ALR.** — Revocation of probation based on defendant's misrepresentation or concealment of information from trial court, 36 ALR4th 1182.

#### 42-8-20. Short title.

This article shall be known and may be cited as the "State-wide Probation Act." (Ga. L. 1956, p. 27, § 1.)

#### JUDICIAL DECISIONS

**Exclusion of certain offenses.** — Offenses punishable by death or life imprisonment are expressly omitted from the provisions of this article. *Brown v. State*, 246 Ga. 251, 271 S.E.2d 163 (1980).

#### 42-8-21. Definitions.

As used in this article, the term:

- (1) "Board" means the Board of Corrections.
- (2) "Commissioner" means the commissioner of corrections.
- (3) "Department" means the Department of Corrections. (Code 1981, § 42-8-21; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1.)

**Editor's notes.** — This Code section was created as part of the Code revision and was thus enacted by Ga. L. 1981, Ex. Sess., p. 8 (Code Enactment Act).

#### 42-8-22. State-wide probation system created; administration generally.

There is created a state-wide probation system to be administered by the Department of Corrections. The probation system shall not be administered as part of the duties and activities of the State Board of Pardons and Paroles. Separate files and records shall be kept with relation to the system. (Ga. L. 1956, p. 27, § 2; Ga. L. 1958, p. 15, § 1; Ga. L. 1962, p. 16, § 1; Ga. L. 1966, p. 56, § 1; Ga. L. 1985, p. 283, § 1.)

**Editor's notes.** — Ga. L. 1972, p. 1069, § 13, provides that the policy-making functions of the probation system be vested in the Board of Offender Rehabilitation (now

Board of Corrections) and that the administrative functions be vested in the Department of Offender Rehabilitation (now Department of Corrections).

### JUDICIAL DECISIONS

**Cited in** *Vandiver v. Manning*, 215 Ga. 874, 114 S.E.2d 121 (1960); *Knowles v. State*, 159 Ga. App. 239, 283 S.E.2d 51 (1981).

### OPINIONS OF THE ATTORNEY GENERAL

**Not administered as part of State Board of Pardons and Paroles.** — Whatever right, if any, the State Board of Pardons and Paroles may have had to require waiver of extradition by probationers under Ga. L. 1943, p. 185 (now Ch. 9 of this title), it is clear that it retains no such right under this article, for this section provides that "such probation

system shall not be administered as part of the duties and activities of the Board of Pardons and Paroles." 1958-59 Op. Att'y Gen. p. 223.

**Board's functions are separate and distinct** from those of the Department of Corrections' Probation Division. 1986 Op. Att'y Gen. No. 86-7.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579. 59 Am. Jur. 2d, Pardon and Parole, § 76. 63A Am. Jur. 2d, Public Officers and Employees, §§ 21, 36, 37, 40, 44, 52, 56, 431-433, 448-453, 461.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1559-1568. 67 C.J.S., Officers, §§ 219, 224, 226. 67A C.J.S., Pardon and Parole, §§ 41, 42. 73 C.J.S., Public Administrative Law and Procedure, §§ 8, 20, 21.

### 42-8-23. Administration of supervision of probationers by Department of Corrections.

The department shall administer the supervision of probationers. Nothing in this Code section shall alter the relationship between judges and probation supervisors prescribed in this article. (Ga. L. 1972, p. 1069, § 14; Ga. L. 1977, p. 1209, § 2; Ga. L. 1978, p. 1647, § 3.)

### OPINIONS OF THE ATTORNEY GENERAL

**State Board of Pardons and Paroles retains quasi-judicial functions and powers.** — Except for the supervision of parolees and the assignment to the Department of Offender Rehabilitation (Corrections) for administrative purposes only, the State Board

of Pardons and Paroles retains its quasi-judicial functions and powers as a result of the Executive Reorganization Act of 1972 (Ga. L. 1972, p. 1015, § 3). 1975 Op. Att'y Gen. No. 75-72.

### RESEARCH REFERENCES

**ALR.** — Probation officer's liability for negligent supervision of probationer, 44 ALR4th 638.

**42-8-24. General duties of department; rules and regulations.**

It shall be the duty of the department to supervise and direct the work of the probation supervisors provided for in Code Section 42-8-25 and to keep accurate files and records on all probation cases and persons on probation. It shall be the duty of the board to promulgate rules and regulations necessary to effectuate the purposes of this chapter. (Ga. L. 1956, p. 27, § 4; Ga. L. 1958, p. 15, § 4; Ga. L. 1967, p. 86, § 3; Ga. L. 1969, p. 945, § 1; Ga. L. 1972, p. 604, § 3.)

**JUDICIAL DECISIONS**

**Cited** in *Wright v. State*, 88 Ga. App. 868, 78 S.E.2d 61 (1953); *Vandiver v. Manning*, 215 Ga. 874, 114 S.E.2d 121 (1960).

**RESEARCH REFERENCES**

**C.J.S.** — 73 C.J.S., Public Administrative Law and Procedure, § 87 et seq.

**42-8-25. Employment of probation supervisors; assignment to circuits by department.**

The department shall employ probation supervisors. The department may assign one supervisor to each judicial circuit in this state or, for purposes of assignment, may consolidate two or more judicial circuits and assign one supervisor thereto. In the event the department determines that more than one supervisor is needed for a particular circuit, an additional supervisor or additional supervisors may be assigned to the circuit. The department is authorized to direct any probation supervisor to assist any other probation supervisor wherever assigned. In the event that more than one supervisor is assigned to the same office or to the same division within a particular judicial circuit, the department shall designate one of the supervisors to be in charge. (Ga. L. 1956, p. 27, § 5; Ga. L. 1958, p. 15, § 5; Ga. L. 1965, p. 413, § 1; Ga. L. 1972, p. 604, § 4.)

**Cross references.** — Appointment of probation officers by courts in juvenile proceedings, § 15-11-7.

**JUDICIAL DECISIONS**

**Cited** in *Knowles v. State*, 159 Ga. App. 239, 283 S.E.2d 51 (1981).



## OPINIONS OF THE ATTORNEY GENERAL

**Circuit probation officers (now probation supervisors) are public officers** and as a consequence hold office at the pleasure of the appointing power. 1968 Op. Att'y Gen. No. 68-461.

**Chairman as full-time probation officer.** —

The chairman of a county board of commissioners may be employed as a full-time probation officer by the Board of Probation (now Department of Corrections). 1968 Op. Att'y Gen. No. 68-21.

**42-8-26. Qualifications of probation supervisors; compensation and expenses; conflicts of interest; bonds.**

(a) In order for a person to hold the office of probation supervisor, he must be at least 21 years of age at the time of appointment and must have completed a standard two-year college course, provided that any person who is employed as a probation supervisor on or before July 1, 1972, shall not be required to meet the educational requirements specified in this Code section, nor shall he be prejudiced in any way for not possessing the requirements. The qualifications provided in this Code section are the minimum qualifications and the department is authorized to prescribe such additional and higher educational qualifications from time to time as it deems desirable, but not to exceed a four-year standard college course.

(b) The compensation of the probation supervisors shall be set by the State Personnel Board and the State Merit System of Personnel Administration. Probation supervisors shall also be allowed travel and other expenses as are other state employees.

(c) (1) No supervisor shall engage in any other employment, business, or activities which interfere or conflict with his or her duties and responsibilities as probation supervisor.

(2) No supervisor shall own, operate, have any financial interest in, be an instructor at, or be employed by any private entity which provides drug or alcohol education services or offers a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Human Resources.

(3) No supervisor shall specify, directly or indirectly, a particular DUI Alcohol or Drug Use Risk Reduction Program which a probationer may or shall attend. This paragraph shall not prohibit any supervisor from furnishing any probationer, upon request, the names of certified DUI Alcohol or Drug Use Risk Reduction Programs. Any supervisor violating this paragraph shall be guilty of a misdemeanor.

(d) Each probation supervisor shall give bond in such amount as may be fixed by the department payable to the department for the use of the person or persons damaged by his misfeasance or malfeasance and conditioned on the faithful performance of his duties. The cost of the bond shall be paid by the department; provided, however, that the bond may be procured, either by the department or by the Department of Administrative

Services, under a master policy or on a group blanket coverage basis, where only the number of positions in each judicial circuit and the amount of coverage for each position are listed in a schedule attached to the bond; and in such case each individual shall be fully bonded and bound as principal, together with the surety, by virtue of his holding the position or performing the duties of probation supervisor in the circuit or circuits, and his individual signature shall not be necessary for such bond to be valid in accordance with all the laws of this state. The bond or bonds shall be made payable to the department. (Ga. L. 1956, p. 27, § 6; Ga. L. 1958, p. 15, § 6; Ga. L. 1960, p. 1092, § 1; Ga. L. 1965, p. 413, § 2; Ga. L. 1967, p. 86, § 4; Ga. L. 1972, p. 604, § 5; Ga. L. 1991, p. 94, § 42; Ga. L. 1992, p. 3221, § 4; Ga. L. 1996, p. 1107, § 1.)

The 1996 amendment, effective April 15, 1996, in subsection (c), designated the existing provisions as paragraph (1) and inserted

“or her” in that paragraph, and added paragraphs (2) and (3).

### OPINIONS OF THE ATTORNEY GENERAL

**Circuit probation officers (now probation supervisors) are public officers** and as a consequence hold office at the pleasure of the appointing power. 1968 Op. Att’y Gen. No. 68-461.

**Compensation of probation personnel under the State Merit System.** — No compensation can be paid to any probation supervisor or other probation personnel employed by the Department of Corrections and serv-

ing in the classified service of the State Merit System beyond that authorized in the compensation plan established by the State Personnel Board. 1989 Op. Att’y Gen. 89-39.

**Owning or instructing in driver improvement school.** — If a state probation officer is an owner of or instructor in a driver improvement school approved pursuant to § 40-5-83, a conflict of interest arises. 1984 Op. Att’y Gen. No. U84-29.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 63A Am. Jur. 2d, Public Officers and Employees, §§ 14, 36, 37, 39, 40, 44, 45, 52, 56, 64-66, 68-78, 80-86, 431-434, 448-453, 461, 487 et seq.

**C.J.S.** — 67 C.J.S., Officers, §§ 7, 15-20, 219, 223-226.

### 42-8-27. Duties of probation supervisors.

The probation supervisor shall supervise and counsel probationers in the judicial circuit to which he is assigned. Each supervisor shall perform the duties prescribed in this chapter and such duties as are prescribed by the department and shall keep such records and files and make such reports as are required of him. (Ga. L. 1956, p. 27, § 7; Ga. L. 1958, p. 15, § 7; Ga. L. 1972, p. 604, § 6.)

**Cross references.** — Applicability of this state’s correction laws to probationers found in other states, Ch. 11 of this title.

## JUDICIAL DECISIONS

**Extraterritorial effect.** — This section is of no effect in State of Alabama. *Roberts v. Lowry*, 160 Ga. 494, 128 S.E. 746 (1925) (decided under Code 1933, § 27-2704, prior to revision by Ga. L. 1956, p. 27, § 7). Cited in *Stephens v. State*, 245 Ga. 835, 268 S.E.2d 330 (1980).

## OPINIONS OF THE ATTORNEY GENERAL

**Probation supervisors as public officers.** — Circuit probation officers (now probation supervisors) are public officers and as a consequence hold office at the pleasure of the appointing power. 1968 Op. Att'y Gen. No. 68-461.

#### 42-8-28. Assignment of probation supervisors among judicial circuits generally.

Probation supervisors shall be assigned among the respective judicial circuits based generally on the relative number of persons on probation in each circuit. (Ga. L. 1972, p. 604, § 15A.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579. §§ 1549-1568. 24B C.J.S., Criminal Law, § 1983.

**C.J.S.** — 24 C.J.S., Criminal Law,

#### 42-8-29. Conduct of presentence investigations and preparation of reports of findings by probation supervisors; supervision of probationers; maintenance of records relating to probationers.

It shall be the duty of the probation supervisor to investigate all cases referred to him by the court and to make his findings and report thereon in writing to the court with his recommendation. The superior court may require, before imposition of sentence, a presentence investigation and written report in each felony case in which the defendant has entered a plea of guilty or nolo contendere or has been convicted. The probation supervisor shall cause to be delivered to each person placed on probation under his supervision a certified copy of the terms of probation and any change or modification thereof and shall cause the person to be instructed regarding the same. He shall keep informed concerning the conduct, habits, associates, employment, recreation, and whereabouts of the probationer by visits, by requiring reports, or in other ways. He shall make such reports in writing or otherwise as the court may require. He shall use all practicable and proper methods to aid and encourage persons on probation and to bring about improvements in their conduct and condition. He shall keep records on each probationer referred to him. (Ga. L. 1956, p. 27, § 9; Ga. L. 1972, p. 604, § 8.)



**Cross references.** — Applicability of this state's correction laws to probationers' found in other states, Ch. 11 of this title.

**Law reviews.** — For article, "A Review of Georgia's Probation Laws," see 6 Ga. St. B.J. 255 (1970).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### PRESENTENCE INVESTIGATION AND REPORT

###### 1. USE

###### 2. REVEALING CONTENTS TO COUNSEL

###### 3. PRESENTENCE AND POST-SENTENCE

##### PROBATIONERS' CERTIFIED COPY OF SENTENCE

#### General Consideration

**Extraterritorial effect.** — This section is of no effect in State of Alabama. *Roberts v. Lowry*, 160 Ga. 494, 128 S.E. 746 (1925).

**Cited in** *Van Voltenburg v. State*, 138 Ga. App. 628, 227 S.E.2d 451 (1976); *Palmer v. State*, 144 Ga. App. 480, 241 S.E.2d 597 (1978); *Martin v. State*, 145 Ga. App. 880, 245 S.E.2d 70 (1978); *Huff v. McLarty*, 241 Ga. 442, 246 S.E.2d 302 (1978); *Bennett v. State*, 164 Ga. App. 239, 296 S.E.2d 787 (1982); *Jones v. State*, 165 Ga. App. 180, 300 S.E.2d 534 (1983).

#### Presentence Investigation and Report

##### 1. Use

**Use of report under § 42-8-34 in fixing sentence.** — The information in the report filed under § 42-8-34 cannot be regarded as "evidence" either in aggravation or in mitigation. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

The trial court is authorized under this section and § 42-8-34 to consider investigative reports prepared by probation officers for the purpose of deciding whether to suspend or probate all or part of the defendant's sentence, but the court cannot use the reports to determine the length of the sentence. *Williams v. State*, 165 Ga. App. 553, 301 S.E.2d 908 (1983).

The presentence investigation report of § 42-8-34 cannot be used in aggravation in fixing the length of the sentence. *Mills v. State*, 244 Ga. 186, 259 S.E.2d 445 (1979).

A probation report cannot be offered in aggravation of sentence, regardless of whether it lists prior offenses. *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981).

**Use of report under § 17-10-2 in fixing sentence.** — Presentence report under § 17-10-2 may be used as evidence in aggravation, thereby affecting the length of sentence, only if it had been made known to the defendant prior to his trial. However, under § 42-8-34 a presentence report is also authorized before pronouncing sentence for the purpose of deciding whether to suspend or probate all or part of the sentence to be imposed in a case. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

If the presentence report is used to determine length of sentence, the procedure set forth in § 17-10-2 must be followed; but if the report is used only to determine whether to probate or suspend all or a portion of the sentence, it could be used. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

A probation report cannot be offered in aggravation of sentence, regardless of whether it lists prior offenses. *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981).

**Use of previously undisclosed report.** — Although use of a previously undisclosed probation report to aid the trial judge in determining whether to suspend or probate a sentence does not invalidate the sentence which is imposed, it cannot be used in fixing the length of the sentence. *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981).

##### 2. Revealing Contents to Counsel

**Judge's discretion to reveal content of report to counsel.** — Since this section does not require the content of a presentence probation report to be shared with counsel, it is in the sound discretion of the trial judge whether to reveal the content of the report to counsel for the accused and for the state.

## Presentence Investigation and Report (Cont'd)

### 2. Revealing Contents to Counsel (Cont'd)

*Benefield v. State*, 140 Ga. App. 727, 232 S.E.2d 89 (1976); *Watts v. State*, 141 Ga. App. 127, 232 S.E.2d 590, cert. denied, 434 U.S. 925, 98 S. Ct. 405, 54 L. Ed. 2d 283 (1977); *Dorsey v. Willis*, 242 Ga. 316, 249 S.E.2d 28 (1978); *Almon v. State*, 151 Ga. App. 863, 261 S.E.2d 772 (1979), cert. denied, 446 U.S. 910, 100 S. Ct. 1839, 64 L. Ed. 2d 263 (1980).

**Disclosure of report containing adverse matters.** — Where a presentence report contains any matter adverse to defendant and likely to influence decision to suspend or probate the sentence, it should be revealed to defense counsel by the trial judge in advance of the presentence hearing to give the accused an opportunity for explanation or rebuttal. *Dorsey v. Willis*, 242 Ga. 316, 249 S.E.2d 28 (1978); *Almon v. State*, 151 Ga. App. 863, 261 S.E.2d 772 (1979), cert. denied, 446 U.S. 910, 100 S. Ct. 1839, 64 L. Ed. 2d 263 (1980).

### 3. Presentence and Post-sentence

**Utility of labeling report as post-sentence or presentence.** — Labeling an investigative report of the probation department as a "post-sentence" report, as distinguished from a "presentence" report, will not change its legal effect where the content, purpose, and function of the report are the same. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

The trial court may not do indirectly — with a "post-sentence" report, that which *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975) proscribes directly — using a 'presentence' report to determine length of sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

**Utilizing later report to determine final length of sentence.** — The trial court erred in imposing the maximum sentence with the intent of utilizing a later report to determine the final length of sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

**"Presentence" and "post-sentence" reports.** — There is no discernible difference between a "presentence" and "post-sentence" report, except as to time of submission, and this is of no import where each is used for the same purpose. Thus, it is permissible to use a "presentence" or "post-sentence" report for the purpose of deciding whether to suspend or probate all or some part of a sentence. For the same reason it is impermissible to use a "presentence" or "post-sentence" report in fixing the length of the sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

**Use of "post-sentence" report to determine sentence.** — Where the trial court intended to use the "post-sentence" report to determine the final length of the sentence, it is implicit that the trial court imposed the original sentence with the intent of determining a final length of sentence only after viewing the "post-sentence" investigative report. In such instance, *Munford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975) and *Mills v. State*, 244 Ga. 186, 259 S.E.2d 445 (1979) proscribe the use of the reports to determine "length" of sentence without compliance with the provisions of § 17-10-2. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

### Probationers' Certified Copy of Sentence

**Purpose of giving probationers certified copy of sentence.** — The purpose of the provision of this section which requires the circuit probation officers to give the probationers a certified copy of the sentence is to ensure that each probationer is familiar with the terms of his sentence. *Poss v. State*, 114 Ga. App. 609, 152 S.E.2d 695 (1966).

**When failure to furnish certified copy not violative of sentence.** — Where the defendant is admittedly familiar with the terms of his sentence, the failure of the circuit probation officer to furnish him with a certified copy of his sentence as required by this section does not violate the terms of the sentence. *Poss v. State*, 114 Ga. App. 609, 152 S.E.2d 695 (1966).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 527, 567-579.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1549-1568.

**ALR.** — Right of convicted defendant or report at sentencing proceedings, 22 prosecution to receive updated presentence ALR5th 660.

**42-8-29.1. Disposition of probation supervisor's documents upon committing of convicted person to institution.**

(a) When a convicted person is committed to an institution under the jurisdiction of the department, any presentence or post-sentence investigation or psychological evaluation compiled by a probation supervisor or other probation official shall be forwarded to any division or office designated by the commissioner. Accompanying this document or evaluation will be the case history form and the criminal history sheets from the Federal Bureau of Investigation or the Georgia Crime Information Center, if available, unless any such information has previously been sent to the department pursuant to Code Section 42-5-50. A copy of these same documents shall be made available for the State Board of Pardons and Paroles. A copy of one or more of these documents, based on need, may be forwarded to another institution to which the defendant may be committed.

(b) The prison or institution receiving these documents shall maintain the confidentiality of the documents and the information contained therein and shall not send them or release them or reveal them to any other person, institution, or agency without the express consent of the probation unit which originated or accumulated the documents. (Code 1981, § 42-8-29.1, enacted by Ga. L. 1983, p. 697, § 1; Ga. L. 1984, p. 22, § 42; Ga. L. 1989, p. 14, § 42.)

**42-8-30. Supervision of juvenile offenders by probation supervisors.**

In the counties where no juvenile probation system exists, juvenile offenders, upon direction of the court, shall be supervised by probation supervisors. Other than in this respect, nothing in this article shall be construed to change or modify any law relative to probation as administered by any juvenile court in this state. (Ga. L. 1956, p. 27, § 16; Ga. L. 1972, p. 604, § 12.)

**Cross references.** — Applicability of this state's correction laws to probationers' found in other states, Ch. 11 of this title.

**JUDICIAL DECISIONS**

**Extraterritorial effect.** — This section is of no effect in State of Alabama. *Roberts v. Lowry*, 160 Ga. 494, 128 S.E. 746 (1925). **Cited** in *P.R. v. State*, 133 Ga. App. 346, 210 S.E.2d 839 (1974).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579. 47 Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 1-70.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1549-1568. 43 C.J.S., Infants, §§ 6-8.

**42-8-30.1. Applicability to counties establishing probation system pursuant to Code Section 42-8-100.**

In any county where the judge of the probate court or chief magistrate of the magistrate court has provided for probation services for either or both of such courts through agreement with a private corporation, enterprise, or agency or has established a county probation system for either or both of such courts pursuant to Code Section 42-8-100, the provisions of this article relating to probation supervision services shall not apply to defendants sentenced in any such court. (Code 1981, § 42-8-30.1, enacted by Ga. L. 1991, p. 1135, § 1; Ga. L. 1993, p. 91, § 42.)

**42-8-31. Collection and disbursement of funds by probation supervisors; maintenance and inspection of records of accounts; bank accounts.**

No probation supervisor shall collect or disburse any funds whatsoever, except by written order of the court; and it shall be the duty of the supervisor to transmit a copy of the order to the department not later than 15 days after it has been issued by the court. Every supervisor who collects or disburses any funds whatsoever shall faithfully keep the records of accounts as are required by the department, which records shall be subject to inspection by the department at any time. In every instance where a bank account is required, it shall be kept in the name of the "State Probation Office." (Ga. L. 1960, p. 1092, § 4; Ga. L. 1972, p. 604, § 15.)

**Cross references.** — Applicability of this state's correction laws to probationers' found in other states, Ch. 11 of this title.

## JUDICIAL DECISIONS

**Extraterritorial effect.** — This section is of no effect in State of Alabama. *Roberts v. Lowry*, 160 Ga. 494, 128 S.E. 746 (1925).

## OPINIONS OF THE ATTORNEY GENERAL

**Collection of supervision fee by department.** — Department of Offender Rehabilitation (Corrections) may not on its own

initiative collect supervision fee from probationers. 1981 Op. Att'y Gen. No. 81-100.

**Collection of funds by probation office**

**employees.** — The Department of Offender Rehabilitation (Corrections) may not enter into an arrangement with the Department of Human Resources in which employees of local probation offices, other than probation supervisors, may collect child support recovery unit money which arises from civil proceedings brought by the Department of Human Resources on behalf of errant fathers. 1982 Op. Att'y Gen. No. 82-99.

**Payment of supervision fee by probationer.** — Probationer's agreement to pay supervision fee should be obtained at time of sentencing and should be recorded. But, regardless of whether probationer agrees, he can be required to pay reasonable supervision fee as condition of probation. 1981 Op. Att'y Gen. No. 81-100.

**Retention of fee.** — Probation supervision fee, collected pursuant to probation order of sentencing court, does not have a statutory premise. Therefore, such a fee does not have to be paid into state treasury but, if permitted by probation order, could be retained by Department of Offender Rehabilitation (Corrections). 1981 Op. Att'y Gen. No. 81-100.

**Authority to collect payments of fines and restitution.** — The collection and disbursement of payments of fines and restitution as may be established as conditions upon the grant of parole may be undertaken by probation supervisors employed by the Department of Offender Rehabilitation (Corrections) so long as such payments are specifically required by court order as the result of a criminal proceeding. 1984 Op. Att'y Gen. No. 84-50.

Probation supervisors employed by the Probation Division of the Georgia Department of Corrections may collect voluntary payments of court-ordered fines and restitution after the expiration of periods of probation. 1987 Op. Att'y Gen. No. 87-10.

**Withholding "collection fee" from fines.** — Since expenses of Department of Offender Rehabilitation (Corrections) in supervising probationers are not a proper cost of prosecution, the department cannot withhold "collection fee" to offset these costs from fines which it collects. 1981 Op. Att'y Gen. No. 81-100.

## 42-8-32. Funds which may be collected by probation supervisors.

No probation supervisor shall be directed to collect any funds other than funds directed to be paid as the result of a criminal proceeding. (Ga. L. 1956, p. 27, § 14; Ga. L. 1958, p. 15, § 10; Ga. L. 1960, p. 1148, § 3; Ga. L. 1972, p. 604, § 10; Ga. L. 1989, p. 380, § 3.)

**Cross references.** — Applicability of this state's correction laws to probationers' found in other states, Ch. 11 of this title.

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 232 (1989).

## JUDICIAL DECISIONS

**Extraterritorial effect.** — This section is of no effect in State of Alabama. *Roberts v. Lowry*, 160 Ga. 494, 128 S.E. 746 (1925).

**Vague sentence on charge of abandonment.** — Where sentence on a charge of abandonment did not specify whether the payments required thereunder were in the nature of a fine or a payment for the support of the defendant's child or children, and failed to specify where or to whom the

payments were to be made, this provision of the sentence was too vague and indefinite to be enforceable, and a revocation of the probation sentence solely on the ground that the defendant did not make the payments specified was without authority of law. *Guest v. State*, 87 Ga. App. 184, 73 S.E.2d 218 (1952).

**Cited in** *Meyers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930).

## OPINIONS OF THE ATTORNEY GENERAL

**Collection of abandonment and bastardy payments.** — In this section, there is no proviso excluding abandonment and bastardy cases and, since both are declared to be misdemeanors, funds directed to be paid as the result of such cases would be the result of "criminal proceedings" as defined in this section, and the probation officers may be ordered to collect same. 1963-65 Op. Att'y Gen. p. 514.

**Probation office employees.** — The Department of Offender Rehabilitation (Corrections) may not enter into an arrangement with the Department of Human Resources in which employees of local probation offices, other than probation supervisors, may collect child support recovery unit money which arises from civil proceedings brought by the Department of Human Resources on behalf of errant fathers. 1982 Op. Att'y Gen. No. 82-99.

**Collection of supervision fee by department.** — Department of Offender Rehabilitation (Corrections) may not on its own initiative collect supervision fee from probationers. 1981 Op. Att'y Gen. No. 81-100.

**Payment of fee by probationer.** — Probationer's agreement to pay supervision fee should be obtained at time of sentencing and should be recorded. But, regardless of whether probationer agrees, he can be required to pay reasonable supervision fee as condition of probation. 1981 Op. Att'y Gen. No. 81-100.

**Retention of fee.** — Probation supervision fee, collected pursuant to probation order of sentencing court, does not have a statutory premise. Therefore, such a fee does not have to be paid into state treasury but, if permitted by probation order, could be retained by Department of Offender Rehabilitation (Corrections). 1981 Op. Att'y Gen. No. 81-100.

**Authority to collect payments of fines and restitution.** — The collection and disbursement of payments of fines and restitution as may be established as conditions upon the grant of parole may be undertaken by probation supervisors employed by the Department of Offender Rehabilitation (Corrections) so long as such payments are specifically required by court order as the result of a criminal proceeding. 1984 Op. Att'y Gen. No. 84-50.

Probation supervisors employed by the Probation Division of the Georgia Department of Corrections may collect voluntary payments of court-ordered fines and restitution after the expiration of periods of probation. 1987 Op. Att'y Gen. No. 87-10.

**Withholding of "collection fee" from fines.** — Since expenses of Department of Offender Rehabilitation (Corrections) in supervising probationers are not a proper cost of prosecution, the department cannot withhold "collection fee" to offset these costs from fines which it collects. 1981 Op. Att'y Gen. No. 81-100.

### 42-8-33. Audits of accounts of probation supervisors; records and reports of audits; bonds of auditors; limitation on refunding overpayment of fines, restitutions, or moneys owed.

(a) The department shall make periodic audits of each probation supervisor who, by virtue of his duties, has any moneys, fines, court costs, property, or other funds coming into his control or possession or being disbursed by him. The department shall keep a permanent record of the audit of each probation supervisor's accounts on file. It shall be the duty of the employee of the department conducting the audit to notify the department in writing of any discrepancy of an illegal nature that might result in prosecution. The department shall have the right to interview and make inquiry of certain selected payors or recipients of funds, as it may choose, without notifying the probation supervisor, to carry out the purposes of the audit. The employee who conducts the audit shall be



required to give bond in such amount as may be set by the department, in the same manner and for the same purposes as provided under Code Section 42-8-26 for the bonds of probation supervisors. The bond shall bind the employee and his surety in the performance of his duties.

(b) Any overpayment of fines, restitutions, or other moneys owed as a condition of probation shall not be refunded to the probationer if the amount of such overpayment is less than \$5.00. (Ga. L. 1960, p. 1092, § 2; Ga. L. 1965, p. 413, § 5; Ga. L. 1967, p. 86, § 5; Ga. L. 1972, p. 604, § 13; Ga. L. 1987, p. 452, § 1.)

**Code Commission notes.** — Pursuant to “ment” was twice substituted for Code Section 28-9-5, in 1987, “overpay- “over-payment” in subsection (b).

**42-8-34. Hearings and determinations; referral of cases to probation supervisors; probation or suspension of sentence; payment of fine or costs; disposition of defendant prior to hearing; continuing jurisdiction; transferral of probation supervision; probation fee.**

(a) Any court of this state which has original jurisdiction of criminal actions, except juvenile courts, municipal courts, and probate courts, in which the defendant in a criminal case has been found guilty upon verdict or plea or has been sentenced upon a plea of nolo contendere, except for an offense punishable by death or life imprisonment, may, at a time to be determined by the court, hear and determine the question of the probation of such defendant.

(b) Prior to the hearing, the court may refer the case to the probation supervisor of the circuit in which the court is located for investigation and recommendation. The court, upon such reference, shall direct the supervisor to make an investigation and to report to the court, in writing at a specified time, upon the circumstances of the offense and the criminal record, social history, and present condition of the defendant, together with the supervisor's recommendation; and it shall be the duty of the supervisor to carry out the directive of the court.

(c) Subject to the provisions of subsection (a) of Code Section 17-10-1 and subsection (g) of Code Section 17-10-3, if it appears to the court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon the defendant but may stay and suspend the execution of the sentence or any portion thereof or may place him on probation under the supervision and control of the probation supervisor for the duration of such probation. The period of probation or suspension shall not exceed the maximum sentence of confinement which could be imposed on the defendant.

(d) In every case that a court of this state or any other state sentences a defendant to probation or any pretrial release or diversion program under

the supervision of the department, in addition to any fine or order of restitution imposed by the court, there shall be imposed a probation fee as a condition of probation, release, or diversion in the amount equivalent to \$20.00 per each month under supervision. The probation fee may be waived or amended after administrative process by the department and approval of the court, or upon determination by the court, as to the undue hardship, inability to pay, or any other extenuating factors which prohibit collection of the fee; provided, however, that the imposition of sanctions for failure to pay fees shall be within the discretion of the court through judicial process or hearings. Probation fees shall be waived on probationers incarcerated or detained in a departmental or other confinement facility which prohibits employment for wages. All probation fees collected by the department shall be paid into the general fund of the state treasury.

(e) The court may, in its discretion, require the payment of a fine or costs, or both, as a condition precedent to probation.

(f) During the interval between the conviction or plea and the hearing to determine the question of probation, the court may, in its discretion, either order the confinement of the defendant without bond or may permit his release on bond, which bond shall be conditioned on his appearance at the hearing and shall be subject to the same rules as govern appearance bonds. Any time served in confinement shall be considered a part of the sentence of the defendant.

(g) The sentencing judge shall not lose jurisdiction over any person placed on probation during the term of his probated sentence. The judge is empowered to revoke any or all of the probated sentence, rescind any or all of the sentence, or, in any manner deemed advisable by the judge, to modify or change the probated sentence at any time during the period of time originally prescribed for the probated sentence to run.

(h) Notwithstanding any provision of this Code or any rule or regulation to the contrary, if a defendant is placed on probation in a county of a judicial circuit other than the one in which he resides for committing any misdemeanor offense, such defendant may, when specifically ordered by the court, have his probation supervision transferred to the judicial circuit of the county in which he resides. (Code 1933, § 27-2702; Ga. L. 1939, p. 285, § 4; Ga. L. 1941, p. 481, § 1; Ga. L. 1950, p. 352, §§ 1, 2; Ga. L. 1956, p. 27, § 8; Ga. L. 1958, p. 15, § 8; Ga. L. 1960, p. 1148, § 1; Ga. L. 1972, p. 604, § 7; Ga. L. 1980, p. 1136, § 1; Ga. L. 1988, p. 988, § 1; Ga. L. 1989, p. 381, §§ 2, 3; Ga. L. 1992, p. 3221, § 5; Ga. L. 1993, p. 426, § 1.)

**Cross references.** — Sentence and punishment generally, Ch. 10, T. 17. Abandonment of child generally, Ch. 10, T. 19. Suspension of sentence in abandonment cases, § 19-10-1(j).

**Law reviews.** — For article, "A Review of Georgia's Probation Laws," see 6 Ga. St. B.J. 255 (1970).

## JUDICIAL DECISIONS

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## General Consideration

**This section has no reference to habeas corpus.** *Cook v. Jenkins*, 146 Ga. 704, 92 S.E. 212 (1917).

**Refusal to release prisoner.** — While original sentence and order revoking probation are still in force, it is not error to refuse to release prisoner upon habeas corpus although the evidence upon such hearing showed no violation of the conditions of probation. *Troup v. Carter*, 154 Ga. 481, 114 S.E. 577 (1922).

**Sentencing error.** — Trial court erred in sentencing person convicted of murder to life imprisonment plus probation to be served under the supervision of the sentencing court. *Brown v. State*, 246 Ga. 251, 271 S.E.2d 163 (1980).

**Cited in** *Streetman v. State*, 70 Ga. App. 192, 27 S.E.2d 704 (1943); *Buice v. Bryan*, 212 Ga. 508, 93 S.E.2d 676 (1956); *Daniel v. Whitlock*, 222 Ga. 192, 149 S.E.2d 79 (1966); *Woodall v. State*, 122 Ga. App. 653, 178 S.E.2d 337 (1970); *Garrett v. State*, 125 Ga. App. 743, 188 S.E.2d 920 (1972); *Calhoun v. Couch*, 232 Ga. 467, 207 S.E.2d 455 (1974); *Barnett v. Hopper*, 234 Ga. 694, 217 S.E.2d 280 (1975); *Dailey v. State*, 136 Ga. App. 866, 222 S.E.2d 682 (1975); *Patton v. Ricketts*, 236 Ga. 293, 223 S.E.2d 635 (1976); *Van Voltenburg v. State*, 138 Ga. App. 628, 227 S.E.2d 451 (1976); *Decker v. State*, 139 Ga. App. 707, 229 S.E.2d 520 (1976); *McKisic v. State*, 238 Ga. 644, 234 S.E.2d 908 (1977); *Patat v. State*, 142 Ga. App. 398, 236 S.E.2d 143 (1977); *Warner v. Jones*, 241 Ga. 467, 246 S.E.2d 320 (1978); *Handsford v. State*, 147 Ga. App. 665, 249 S.E.2d 768 (1978); *Stallworth v. State*, 150 Ga. App. 766, 258

S.E.2d 611 (1979); *Cofer v. Hawthorne*, 154 Ga. App. 875, 270 S.E.2d 84 (1980); *Johnson v. State*, 156 Ga. App. 511, 274 S.E.2d 669 (1980); *Parkerson v. State*, 156 Ga. App. 440, 274 S.E.2d 799 (1980); *Turnipseed v. State*, 158 Ga. App. 266, 279 S.E.2d 725 (1981); *State v. Hasty*, 158 Ga. App. 464, 280 S.E.2d 873 (1981); *Dilas v. State*, 159 Ga. App. 39, 282 S.E.2d 690 (1981); *Fowler v. State*, 159 Ga. App. 496, 283 S.E.2d 710 (1981); *Jackson v. State*, 248 Ga. 480, 284 S.E.2d 267 (1981); *Johns v. State*, 160 Ga. App. 535, 287 S.E.2d 617 (1981); *Stillwell v. State*, 161 Ga. App. 230, 288 S.E.2d 295 (1982); *Howard v. State*, 161 Ga. App. 743, 289 S.E.2d 815 (1982); *Jones v. State*, 165 Ga. App. 180, 300 S.E.2d 534 (1983); *Strickland v. State*, 165 Ga. App. 197, 300 S.E.2d 537 (1983); *Pooler v. Taylor*, 173 Ga. App. 859, 328 S.E.2d 749 (1985); *Taylor v. State*, 181 Ga. App. 199, 351 S.E.2d 723 (1986); *Acker v. State*, 184 Ga. App. 321, 361 S.E.2d 509 (1987); *Harrison v. State*, 201 Ga. App. 577, 411 S.E.2d 738 (1991); *Cauldwell v. State*, 211 Ga. App. 417, 439 S.E.2d 90 (1993).

## Hearing and Determination

**Stage of proceedings to determine probation.** — The language of this section seems to refer to probation as a part of the original sentence, and the provision for a hearing must, considering the language as a whole, refer to a hearing on the type of sentence to be imposed, and not authorize the court, at a subsequent term, to add to the sentence a provision for probation where he made no provision relating thereto in the first instance. *Phillips v. State*, 95 Ga. App. 277, 97 S.E.2d 707 (1957).



**Hearing and Determination (Cont'd)**

**Consideration of conduct during trial.** — Trial court may properly consider defendant's conduct during trial in considering whether to suspend or probate all of the sentence, and such a consideration does not come within the restrictions of § 17-10-2. *Williams v. State*, 165 Ga. App. 553, 301 S.E.2d 908 (1983).

**Consideration of conduct prior to sentencing.** — The trial court did not err in considering information as to an altercation between the defendant and a deputy sheriff taking him to his cell during the trial prior to sentencing where the sentence was already set and the information complained of was considered by the trial court merely to determine what portions would be served on probation or incarceration. *Fields v. State*, 167 Ga. App. 816, 307 S.E.2d 712 (1983).

**Juvenile court adjudications considered.** — It is not unconstitutional to use juvenile court adjudications to determine whether subsequent felony conviction should be probated. *Browner v. State*, 250 Ga. 125, 296 S.E.2d 551 (1982).

**Omission of presentence hearing.** — It is error to omit the presentence hearing to decide on the defendant's punishment after the verdict. *Howard v. State*, 161 Ga. App. 743, 289 S.E.2d 815 (1982).

### **Referral for Investigation and Recommendation**

**Referral of case to probation officer not jurisdictional.** — Under this section, the court sentencing the defendant has jurisdiction of the probation features of the case and may refer the case to a circuit probation officer (now probation supervisor) for investigation and recommendation prior to hearing, but the fact that the court has placed the defendant on probation without such referral does not mean either that the court is without jurisdiction to revoke the probation, or that the provisions of this article do not apply. *Harrington v. State*, 97 Ga. App. 315, 103 S.E.2d 126 (1958).

**Use of juvenile court record in investigation report.** — This section and § 15-11-38, construed in *pari materia*, clearly authorize the use of the juvenile court record in dispositional proceedings after conviction of a felony for the purposes of a presentence

investigation and report. *Jones v. State*, 129 Ga. App. 623, 200 S.E.2d 487 (1973).

Adjudications or dispositions under Ch. 11, T. 15 and its predecessors do not constitute a "criminal record," but a juvenile court record would be included within appellant's "social history," for the purpose of this section. *Jones v. State*, 129 Ga. App. 623, 200 S.E.2d 487 (1973).

**Presentence Investigation and Report****1. In General**

**Ordering of probation report.** — It is in discretion of court whether or not to order probation report. *Belcher v. State*, 173 Ga. App. 509, 326 S.E.2d 857 (1985).

Whether or not to order a probation report to determine whether defendant's sentence should be suspended or whether he should be placed on probation is within the sound discretion of the trial judge. *Hill v. State*, 212 Ga. App. 386, 441 S.E.2d 863 (1994).

**Reports under this section and § 17-10-2 compared.** — Reports under this section are more diverse in the type of information they may contain since they are used only in determining the question of suspension or probation of sentence and need not be shown to counsel, whereas, reports under § 17-10-2 are more restrictive and must be shown to counsel before trial. *Moss v. State*, 159 Ga. App. 317, 283 S.E.2d 275 (1981).

**Not to be regarded as evidence.** — Information in report filed under this section cannot be regarded as "evidence" either in aggravation or in mitigation. *Threath v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

**2. Use**

**Consideration for deciding whether to suspend or revoke sentence.** — This section authorizes the trial judge to consider investigation reports for the purpose of deciding whether to suspend or probate all or part of the sentence. Although authorized for consideration on the question of probation, in practice such reports may be considered by the trial judge in reducing the length of the sentence. *Bentley v. Willis*, 247 Ga. 461, 276 S.E.2d 639 (1981).

The trial court is authorized under § 42-8-29 and this section to consider inves-

tigative reports prepared by probation officers for the purpose of deciding whether to suspend or probate all or part of the defendant's sentence, but the court cannot use the reports to determine the length of the sentence. *Williams v. State*, 165 Ga. App. 553, 301 S.E.2d 908 (1983).

**Probation report cannot be offered in aggravation of sentence**, regardless of whether it lists prior offenses. *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981).

**Use of previously undisclosed report.** — Although use of a previously undisclosed probation report to aid the trial judge in determining whether to suspend or probate a sentence does not invalidate the sentence which is imposed, it cannot be used in fixing the length of the sentence. *McDuffie v. Jones*, 248 Ga. 544, 283 S.E.2d 601 (1981).

**Use as evidence in aggravation.** — A presentence report under § 17-10-2 may be used as evidence in aggravation, thereby affecting the length of sentence, only if it had been made known to the defendant prior to his trial. However, under this section a presentence report is also authorized before pronouncing sentence for the purpose of deciding whether to suspend or probate all or part of the sentence to be imposed in a case. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

**Use in determining length of sentence.** — If the presentence report is to be used to determine length of sentence, the procedure set forth in § 17-10-2 must be followed; but, if the report is to be used only to determine whether to probate or suspend all or a portion of the sentence, it can be used. The presentence investigation report cannot be used in aggravation in fixing the length of the sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

### 3. Disclosure of Contents to Counsel

**Judge's discretion to reveal content of report to counsel.** — Since this section does not require the content of a presentence probation report to be shared with counsel, it is in the sound discretion of the trial judge whether to reveal the content of the report to counsel for the accused and for the state. *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975); *Benefield v. State*, 140 Ga. App. 727, 232 S.E.2d 89 (1976); *Watts v. State*, 141 Ga. App. 127, 232 S.E.2d 590, cert. denied, 434

U.S. 925, 98 S. Ct. 405, 54 L. Ed. 2d 283 (1977); *Dorsey v. Willis*, 242 Ga. 316, 249 S.E.2d 28 (1978); *Almon v. State*, 151 Ga. App. 863, 261 S.E.2d 772 (1979), cert. denied, 446 U.S. 910, 100 S. Ct. 1839, 64 L. Ed. 2d 263 (1980).

**Disclosure of presentence report containing adverse matters.** — If a presentence probation officer's report contains any matter adverse to the defendant and likely to influence the decision to suspend or probate the sentence, it should be revealed to defense counsel by the trial judge in advance of the presentence hearing to give the accused an opportunity for explanation or rebuttal. *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975); *Benefield v. State*, 140 Ga. App. 727, 232 S.E.2d 89 (1976); *Dorsey v. Willis*, 242 Ga. 316, 249 S.E.2d 28 (1978); *Almon v. State*, 151 Ga. App. 863, 261 S.E.2d 772 (1979), cert. denied, 446 U.S. 910, 100 S. Ct. 1839, 64 L. Ed. 2d 263 (1980).

**Notification by court of intent to use matters in aggravation.** — When the trial court intends to consider matters in aggravation that were ruled inadmissible during the guilt-innocence phase of the trial, the court must inform defense counsel and the prosecution of its plans in this regard before the presentence hearing. Absent such notice from the trial court judge, the defense and the prosecution cannot adequately prepare their cases or summon their witnesses for the presentence hearing. *Dorsey v. Willis*, 242 Ga. 316, 249 S.E.2d 28 (1978).

### 4. Presentence and Post-sentence

**Effect of labeling report as post-sentence or presentence.** — Labeling an investigative report of the probation department as a "post-sentence" report, as contradistinguished from a "presentence" report, will not change its legal effect where the content, the purpose, and function of the report are the same. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

The trial court may not do indirectly — with a "post-sentence" report, that which *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975) proscribes directly — using a "presentence" report to determine length of sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

**Utilizing later report to determine final length of sentence.** — The trial court erred



## **Presentence Investigation and Report (Cont'd)**

### **4. Presentence and Post-sentence (Cont'd)**

in imposing the maximum sentence with the intent of utilizing a later report to determine the final length of sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

**Difference between "presentence" and "post-sentence" reports.** — Because there is no discernible difference between a "presentence" and "post-sentence" report, except as to time of submission, this is of no import where each is used for the same purpose. Thus, it is permissible to use a "presentence" or "post-sentence" report for the purpose of deciding whether to suspend or probate all or some part of a sentence. For the same reason it is impermissible to use a "presentence" or "post-sentence" report in fixing the length of the sentence. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

Where the trial court intended to use the "post-sentence" report to determine the final length of the sentence, it is implicit that the trial court imposed the original sentence with the intent of determining a final length of sentence only after viewing the "post-sentence" investigative report. In such instance, *Munford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975) and *Mills v. State*, 244 Ga. 186, 259 S.E.2d 445 (1979), proscribe the use of the reports to determine "length" of sentence without compliance with the provisions of § 17-10-2. *Threatt v. State*, 156 Ga. App. 345, 274 S.E.2d 734 (1980).

### **Condition Precedent to Probation**

#### **Payment of fine as condition precedent.**

— A condition of sentence to be served on probation may include the immediate payment of a fine. Such a sentence does not violate the due process and equal protection clause of U.S. Const., Amend. 14. *Hunter v. Dean*, 240 Ga. 214, 239 S.E.2d 791 (1977), cert. dismissed, 439 U.S. 281, 99 S. Ct. 712, 58 L. Ed. 2d 520 (1978), overruled on other grounds, *Massey v. Meadows*, 253 Ga. 389, 321 S.E.2d 703 (1984).

**Ability of defendant to pay fine.** — Because the ability of a defendant to pay a fine is often a factor for the sentencing judge to consider in assessing the likelihood that the defendant will serve a term of probation

without violation, a conditionally probated sentence is not necessarily invidious discrimination based on wealth if the sentencing judge has determined that the defendant would not be a good candidate for probation unless a fine is paid first. *Hunter v. Dean*, 240 Ga. 214, 239 S.E.2d 791 (1977), cert. dismissed, 439 U.S. 281, 99 S. Ct. 712, 58 L. Ed. 2d 520 (1978), overruled on other grounds, *Massey v. Meadows*, 253 Ga. 389, 321 S.E.2d 703 (1984).

A condition of probation which stipulated that the defendant pay a fine "as and when directed by probation officer" without having held a hearing on his indigency did not violate this section, since payment of the fine was not a condition precedent to the entry upon probation. *Whitehead v. State*, 207 Ga. App. 891, 429 S.E.2d 536 (1993).

**Defendant must be aware of condition precedent.** — While a court may lawfully require the payment of a fine as a condition precedent to being allowed to begin a probationary period, due process demands that the defendant be made aware that such condition is in fact a condition precedent. *Huff v. McLarty*, 241 Ga. 442, 246 S.E.2d 302 (1978).

**Conditioning probation on lump sum payment of fine.** — Probation of a jail sentence may constitutionally be conditioned upon payment of a fine in lump sum when the defendant is indigent and unable to make immediate payment of the fine. *Hunter v. Dean*, 240 Ga. 214, 239 S.E.2d 791 (1977), cert. dismissed, 439 U.S. 281, 99 S. Ct. 712, 58 L. Ed. 2d 520 (1978), overruled on other grounds, *Massey v. Meadows*, 253 Ga. 389, 321 S.E.2d 703 (1984).

**Condition not to engage in practice of law permissible.** — The inclusion in a probation order of the condition that the defendant not engage in the practice of law for a period of one year is within the sound discretion of the court in probating the sentence and is authorized under this section and § 42-8-35. *Yarbrough v. State*, 119 Ga. App. 46, 166 S.E.2d 35 (1969).

### **Probation or Suspension of Sentence**

#### **Probated confinement held excessive.**

— Where a repeat offender was convicted on two counts of misdemeanor theft, and the trial court imposed probated confinement for a period of five years when the maximum period of confinement which could be im-



posed was for a term of one year, this error was not harmless, as both sentences ran consecutively and one of the conditions of the probation was, that in the event probation was revoked, the trial court could order the execution of the sentence originally imposed. *Tenney v. State*, 194 Ga. App. 820, 392 S.E.2d 294 (1990).

**Notice and hearing prior to revocation of suspended sentence.** — A sentence which is suspended cannot be revoked as to the suspension feature without notice and opportunity to be heard. This is true as the modification may be made only after hearing and a finding by the court that the defendant has failed to comply with the terms under which the sentence was suspended. *Entrekin v. State*, 147 Ga. App. 724, 250 S.E.2d 177 (1978).

**Crimes to which probation of sentence permissible.** — It is within the power of the court to pass probation sentence where defendant convicted of operating automobile while intoxicated. *Jones v. State*, 27 Ga. App. 631, 110 S.E. 33 (1921).

It is within the power of the court to pass probation sentence where defendant has been convicted of criminally abandoning his child. *Towns v. State*, 25 Ga. App. 419, 103 S.E. 724, cert. denied, 25 Ga. App. 841 (1920).

**Placing defendant on probation.** — Under this section, the court may, upon a verdict of guilty in the case of a defendant who has not been previously convicted of a felony, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation which would authorize discharge without court adjudication of guilt in the event defendant did not violate probation. *Winget v. State*, 138 Ga. App. 433, 226 S.E.2d 608, overruled on other grounds, *Quick v. State*, 139 Ga. App. 440, 228 S.E.2d 592 (1976).

**Probating sentence after passage of more than four terms of court.** — Trial court had authority to probate defendant's sentence to confinement, even though more than four terms of court had passed since conviction and sentence, where the court did not intend its sentence to be the final sentence and probated the confinement after receiving a post-sentence investigator's report. *State v. Johnson*, 183 Ga. App. 236, 358

S.E.2d 840, cert. denied, 183 Ga. App. 907, 358 S.E.2d 840 (1987).

### Continuing Jurisdiction of Sentencing Court

**Retention for entire term of probation.** — The sentencing judge retains jurisdiction over the probated person during the entire term of such probated sentence, but cannot revoke any sentence which has expired at the time the revocation proceedings are had, nor revoke any future sentence which has not begun to run at the time of such revocation proceedings. *Todd v. State*, 108 Ga. App. 615, 134 S.E.2d 56 (1963).

**Authority of judge.** — A trial judge is granted power and authority to suspend or probate a determinate sentence; he does not have authority to do both. *Jones v. State*, 154 Ga. App. 581, 269 S.E.2d 77 (1980).

**Modification of conditions of probation.** — If the conditions of probation are believed to be illegal, appellant may apply for modification under the provisions of this section which continues jurisdiction of probation in the sentencing judge. *Dean v. Whalen*, 234 Ga. 182, 215 S.E.2d 7 (1975).

The expansion of power of modification granted to the sentencing court applies only to the probated portion of a split-time sentence. *Burns v. State*, 153 Ga. App. 529, 265 S.E.2d 859 (1980).

Prior to this section's enactment, a trial judge did not have authority to suspend the execution of a sentence, except to review the judgment upon which the sentence was imposed. *Henry v. State*, 77 Ga. App. 735, 49 S.E.2d 681 (1948).

Trial court's power to rescind, modify, or change a sentence "at any time" is limited by its terms to the sentence itself or its conditions and the court may not go behind the sentence to readdress the merits of a plea which was ruled on in a preceding term. *State v. James*, 211 Ga. App. 149, 438 S.E.2d 399 (1993).

Trial court had authority to require defendant to undergo treatment as a sex offender after he began serving his probated sentence, and the addition of such a condition was authorized whether or not there had been a violation of existing conditions of probation. *Edwards v. State*, 216 Ga. App. 740, 456 S.E.2d 213 (1995).

### Continuing Jurisdiction of Sentencing Court (Cont'd)

**Section modified by § 17-10-1.** — This section, which provides that the court shall not lose jurisdiction over a defendant during the term of a probated sentence, but shall have power to change or modify it during the period of time originally described for the probated sentence to run, has been modified by § 17-10-1 which provided that after the term of court at which a sentence is imposed by a judge, he shall have no authority to suspend, probate, modify, or change the sentence of the prisoner, except as otherwise provided. *Entrekin v. State*, 147 Ga. App. 724, 250 S.E.2d 177 (1978).

**Court's discretion in revocation hearing.** — In a revocation of probation hearing, the trial court, as the trier of fact, has a very wide discretion and evidence of misconduct of the probationer is sufficient where no manifest abuse of discretion has been shown. *Barron v. State*, 158 Ga. App. 172, 279 S.E.2d 299 (1981).

**Basis for revoking defendant's probation.** — Where the defendant and the trial judge agreed on restitution as a condition of his probated sentence, and where there was evidence that the defendant was able to pay other bills, and he continued to operate his business and pay business expenses, this could and did serve as basis of defendant's probation revocation. *Fong v. State*, 149 Ga. App. 456, 254 S.E.2d 460 (1979).

**Revocation of probation based on subsequent crime.** — Nothing in this section prevents the revocation of the probated portion of a sentence based upon a separate crime committed during the portion of the sentence to be served in confinement. *Layson v. Montgomery*, 251 Ga. 359, 306 S.E.2d 245 (1983).

**Amending or revoking sentence before commencement of sentence.** — The court has no power to amend a sentence or revoke its probationary or suspended feature before the term of sentence has commenced to run, except in the case of the exercise of the plenary power of the court to amend, modify, or rescind judgments during the term of court in which they are entered; and it is error to order the revocation of such sentence, the term of which is not in effect at the time of the purported revocation. *Todd*

*v. State*, 107 Ga. App. 771, 131 S.E.2d 201 (1963).

The trial court has no power to amend and modify a sentence in a criminal case after the term during which it was imposed; accordingly, where the defendant had been sentenced to an indeterminate term in the penitentiary without any provision for probation, the court properly refused to entertain a motion made at a subsequent term that the sentence be modified so as to allow the defendant to serve it on probation. *Phillips v. State*, 95 Ga. App. 277, 97 S.E.2d 707 (1957).

**Revocation of sentence being served.** — A probated or suspended sentence may be revoked provided the sentence being revoked is in effect and being served at the time the order of revocation is made, even though the act upon which the revocation is based was committed prior to the date the defendant actually begins serving such probated sentence, but after the date of the imposition of the sentence. *Todd v. State*, 108 Ga. App. 615, 134 S.E.2d 56 (1963).

A court revoking probation because of a subsequent conviction may not make the revoked sentence consecutive to an intervening sentence. *England v. Newton*, 238 Ga. 534, 233 S.E.2d 787 (1977).

The probated portion of a sentence may be revoked or modified at any time during the term of the probated sentence, after hearing and finding of probation violation. *Logan v. Lee*, 247 Ga. 608, 278 S.E.2d 1 (1981).

**The revoking court may not increase the original sentence.** — Thus the language "modify or change" in this section is limited by § 42-8-38. *England v. Newton*, 238 Ga. 534, 233 S.E.2d 787 (1977).

While under this section, the trial court does have jurisdiction to change or modify the terms of the original sentence, it cannot, under §§ 17-10-1 and 42-8-38, increase the sentence originally passed. *Turnipseed v. State*, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

**Suspended sentence cannot exceed maximum sentence of confinement.** — Once service of a suspended sentence begins, either by incarceration or probation, it cannot exceed the maximum sentence of confinement which could have been imposed. *Turnipseed v. State*, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

**Misdemeanors.** — For a misdemeanor, the



probated sentence must be considered served at the end of the 12-month period. *Entrekin v. State*, 147 Ga. App. 724, 250 S.E.2d 177 (1978).

**Revocation of sentence commencing at future date.** — By reading this section with § 17-10-1, a trial judge can revoke a probated sentence that is to begin at a future date. *Parrish v. Ault*, 237 Ga. 401, 228 S.E.2d 808 (1976); *Roberts v. State*, 148 Ga. App. 708, 252 S.E.2d 209 (1979).

**Amending sentence during same court term by shortening imprisonment.** — The power of a superior court in a criminal case to amend a sentence during the same term of the court in which it was imposed, by shortening the period of imprisonment, is not lost by entry of the defendant upon the service of such sentence. Where, by an amendment so made during the same term,

the period of service in the penitentiary, as fixed in a sentence for a reducible felony, is changed to a shorter term in the county correctional institution as for a misdemeanor, the amendment may also provide for service of the misdemeanor sentence, or any remainder thereof, on probation. *Gobles v. Hayes*, 194 Ga. 297, 21 S.E.2d 624 (1942) (decided under former Code 1933, § 27-2702 prior to revision by Ga. L. 1956, p. 27).

**Increase in child-support payments before suspension revoked.** — Increase in the amount of the child-support payments pursuant to this section does not constitute double punishment or jeopardy, where the defendant's sentence has been suspended and suspension has not been revoked. *Hudson v. State*, 248 Ga. 397, 283 S.E.2d 271 (1981).

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**Use of juveniles' psychological tests.** — If appropriate safeguards to protect the confidentiality of the records are undertaken, results of psychological tests administered to juveniles appearing in the juvenile court may be computerized and may be used in later court proceedings as authorized by §§ 15-11-38, 15-11-59 and this section. 1983 Op. Att'y Gen. No. U83-25.

**Requirement to place defendant on probation.** — Unless the judge expressly states in his order that he is placing the defendant on probation, the defendant receives the sentence which is prescribed. 1968 Op. Att'y Gen. No. 68-398.

**Retention of jurisdiction despite appeal.** — Court originally passing sentence which includes placing defendant on probation retains jurisdiction to revoke, rescind, or modify such probated sentence, notwithstanding that original case was appealed where decision of appellate court made decision of trial court. 1962 Op. Att'y Gen. p. 134.

**Awarding earned time against probated sentence** would frustrate intent of sentencing judge who has made a previous, judicial determination under § 17-10-1 and this section that the particular individual should be subject to a specific period of supervision and control while he is being reintegrated into society. 1982 Op. Att'y Gen. No. 82-58.

Inmate who actually serves three years incarceration of six-year sentence should receive only three years credit against concurrent ten-year probated sentence, and if the ten-year probated sentence is later revoked, all time served prior to revocation, including time served in prison pursuant to the separate sentence, should be considered only as probation time, meaning nonearning time under § 42-5-100. 1982 Op. Att'y Gen. No. 82-58.

**Computation of sentence after parole and one year of probation revoked.** — Where inmate receives a sentence of 15 years, ten years to be served in confinement and the remaining five years to be served on probation; after three years and seven months of confinement the inmate is paroled; one year of the probated portion of the sentence is revoked after parole for ten months; and parole is revoked one month later, the inmate would be entitled to full credit for the three years and seven months he spent in incarceration and the ten-month period he served on parole and would be required to serve the remaining five years and seven months on the original ten-year confinement sentence plus an additional one year of the probated portion of the sentence which was revoked. 1986 Op. Att'y Gen. No. 86-7.

**Requirement to contribute for probation supervisors' insurance.** — A probationer can



be required to pay by court order, as a condition of his/her probation, a reasonable amount toward the cost of maintaining insurance to protect probation supervisors from personal liability should probationers be injured while performing court-ordered community service. 1983 Op. Att'y Gen. No. 83-18.

**Retention of jurisdiction during term of probation.** — A court retains jurisdiction over a probationer during the term of his probationary sentence for the purpose of changing or modifying the order placing a defendant on probation during the whole of the probationary term imposed, or until the court finds that the conditions of probation have been breached. 1945-47 Op. Att'y Gen. p. 107.

**Service of entire sentence by youthful offender.** — A judge may require service of the entire sentence, even though the service of such sentence would run past the fourteenth or twenty-first birthday of the child; this conclusion is based on the fact that the age of the child designates only the length of jurisdiction to "revoke," rather than jurisdiction per se. 1963-65 Op. Att'y Gen. p. 514.

**Child abandonment prosecution not barred by bastardy prosecution.** — A bastardy prosecution is not a bar to a subsequent child abandonment prosecution. 1969 Op. Att'y Gen. No. 69-323.

**Liability of father for failure to support.** — A father is criminally liable, throughout the minority of his illegitimate child, for a failure to support that child. 1969 Op. Att'y Gen. No. 69-323.

**A suspended sentence in abandonment and bastardy cases is permissible** and the court may retain jurisdiction of the offender until the offender's child has reached the age designated by the statute. 1963-65 Op. Att'y Gen. p. 514.

**Hearing for probation violator.** — A probation violator may be returned to the sentencing court for a hearing or he may have a hearing in a court of equivalent original criminal jurisdiction within the county

wherein the probationer resides for purposes of supervision upon the giving of ten days' written notice to the sentencing court prior to the hearing on the merits. 1965-66 Op. Att'y Gen. No. 66-257.

**Collection of funds by probation officer.** — Upon proper court order, the probation officers would be authorized to collect funds made payable in connection with suspended sentences. 1963-65 Op. Att'y Gen. p. 4.

**Power of Board of Corrections to change probation.** — The Board of Offender Rehabilitation (Corrections) does not have power to change the conditions of probation; these, including travel restrictions, could be changed only by order of the sentencing court. 1971 Op. Att'y Gen. No. U71-83.

**Board prohibited from placing terms on probationer not required by court.** — The Board of Probation (now Board of Corrections) or its agents may not place on a prisoner, in connection with his probation, any terms or conditions not required of him by court order passed by the trial judge at the conclusion of the hearing held for the purpose of considering his probation. 1958-59 Op. Att'y Gen. p. 223.

**Revocation.** — Board has jurisdiction to revoke "probation" or conditional release granted by the board; but during that period in which the inmate is serving a portion of the sentence on probation ordered by the court, the court has jurisdiction of revocation proceedings. 1970 Op. Att'y Gen. No. 70-201.

**Some courts excluded from working with probation supervisors.** — Courts in which state offenses cannot be tried are excluded from working with the probation supervisors. 1979 Op. Att'y Gen. No. U79-27.

**Authority of county recorder's court.** — The county recorder's court does not have authority to place persons convicted of traffic offenses under the supervision of probation supervisors of the Department of Offender Rehabilitation (Corrections). 1979 Op. Att'y Gen. No. U79-27.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579. 63A Am. Jur. 2d, Public Officers and Employees, § 460.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1459, 1480, 1503, 1511, 1549-1568.

**ALR.** — Power of trial court to change sentence after affirmance, 23 ALR 536.

Constitutionality of statute conferring on court power to suspend sentence, 26 ALR 399; 101 ALR 402; 109 ALR 1048; 132 ALR 819; 158 ALR 1315.

Imposition or enforcement of sentence which has been suspended without authority, 141 ALR 1225.

Propriety and effect of court's indication to jury that court would suspend sentence, 8 ALR2d 1001.

Consideration of accused's juvenile court record in sentencing for offense committed as adult, 64 ALR3d 1291.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part, 73 ALR3d 474.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim, 79 ALR3d 976.

Propriety of conditioning probation upon defendant's posting of bond guaranteeing compliance with terms of probation, 79 ALR3d 1068.

Validity of requirement that, as condition of probation, defendant submit to warrantless searches, 79 ALR3d 1083.

Right of defendant sentenced after revocation of probation to credit for jail time served as a condition of probation, 99 ALR3d 781.

Appealability of order suspending imposition or execution of sentence, 51 ALR4th 939.

#### **42-8-34.1. Requirements for revocation of probated or suspended sentence; restitution or fines; limitation on probation supervision.**

(a) Notwithstanding any other provision of law, no court may revoke any part of any probated or suspended sentence unless the defendant admits the violation as alleged or unless the evidence produced at the revocation hearing establishes by a preponderance of the evidence the violation or violations alleged.

(b) At any revocation hearing, upon proof that the defendant has violated any provision of probation or suspension other than by commission of a new felony offense, the court shall consider the use of alternatives to include community service, intensive probation, diversion centers, probation detention centers, special alternative incarceration, or any other alternative to confinement deemed appropriate by the court or as provided by the state or county. In the event the court determines that the defendant does not meet the criteria for said alternatives, the court may revoke the balance of probation or not more than two years in confinement, whichever is less.

(c) If the violation of probation or suspension alleged and proven by a preponderance of the evidence or the defendant's admission is the commission of a felony offense or the violation of a special condition imposed pursuant to this Code section, notwithstanding any other provision of law, the court may revoke no more than the lesser of the balance of probation or the maximum time of the sentence authorized to be imposed for the crime constituting the violation of the probation.

(d) The payment of restitution or reparation, costs, or fines ordered by the court may be payable in one lump sum or in periodic payments, as determined by the court after consideration of all the facts and circumstances of the case and of the defendant's ability to pay. Such payments

shall, in the discretion of the sentencing judge, be made either to the clerk of the sentencing court or, if the sentencing court is a probate court, state court, or superior court, to the probation office serving said court.

(e) In no event shall an offender be supervised on probation for more than a total of two years for any one offense or series of offenses arising out of the same transaction, whether before or after confinement, except as provided by paragraph (2) of subsection (a) of Code Section 17-10-1. (Code 1981, § 42-8-34.1, enacted by Ga. L. 1988, p. 1911, § 1; Ga. L. 1989, p. 855, § 1; Ga. L. 1992, p. 3221, § 6.)

**Law reviews.** — For note on 1989 amendment of this Code section, see 6 Ga. St. U.L. Rev. 287 (1989).

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**Probation revocation's two year limitation.** — Where, after defendant's probation revocation hearing, the trial court ordered defendant to serve six months in jail for each of the seven probation violations found to total three and one-half years, that order violated the plain words of subsection (b), limiting confinement for probation revocation to no more than two years. *Cockrell v. Brown*, 263 Ga. 345, 433 S.E.2d 585 (1993).

**Burden is on the state to prove a violation of probation** by a preponderance of the evidence. *Farmer v. State*, 216 Ga. App. 515, 455 S.E.2d 297 (1995).

**Effect of change in quantum of proof.** — That the quantum of proof necessary to revoke probation has been changed from "slight evidence" to "a preponderance of the evidence" does not affect the rule that a ruling in favor of the probationer, continuing rather than revoking his probation, has no collateral estoppel effect in a subsequent criminal trial. *State v. Jones*, 196 Ga. App. 896, 397 S.E.2d 209 (1990).

**Authority to order full sentence.** — The municipal court was not authorized to order the full sentence into execution upon revocation of a suspended sentence. *Hughes v. Town of Tyrone*, 211 Ga. App. 616, 440 S.E.2d 58 (1994).

**Violation of special condition.** — Where the violation of probation results solely from infraction of a special condition, not from commission of a felony offense, the revocation court is authorized by subsection (c) to revoke no more than the balance of defen-

dant's probation. *Gearinger v. Lee*, 266 Ga. 167, 465 S.E.2d 440 (1996).

**Violation not established by preponderance of the evidence.** — Where defendant's mother was also a previously convicted drug violator; the cocaine and money were in defendant's mother's possession; nothing was found on defendant's person; and during the period of time in which the house was under surveillance, defendant had not been seen entering or leaving the house, this evidence did not establish by a preponderance of the evidence that defendant violated his probation by possessing cocaine with intent to distribute. *Anderson v. State*, 212 Ga. App. 329, 442 S.E.2d 268 (1994).

**Where probationer both committed a felony and violated a special condition**, the revocation court was authorized to dispose of probationer as having either violated a special condition or committed a felony. *Manville v. Hampton*, 266 Ga. 857, 471 S.E.2d 872 (1996).

**Evidence inadmissible when untimely notice to defendant.** — Sentence of defendant to confinement for two years, eight months, and fifteen days upon revocation of probation was reversed because it exceeded the two-year limitation of this section. *Gordon v. State*, 217 Ga. App. 271, 456 S.E.2d 761 (1995).

**Cited in** *Ledford v. State*, 189 Ga. App. 148, 375 S.E.2d 280 (1988); *Eubanks v. State*, 197 Ga. App. 731, 399 S.E.2d 290 (1990); *Mays v. State*, 200 Ga. App. 457, 408 S.E.2d 714 (1991); *Riggins v. State*, 206 Ga. App.



239, 424 S.E.2d 879 (1992); Penaherrera v. (1993); Derrer v. Anthony, 265 Ga. 892, 463 State, 211 Ga. App. 162, 438 S.E.2d 661 S.E.2d 690 (1995).

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**Violation of diversion center regulations.** — If the conditions of probation include a requirement that the probationer obey the rules and regulations of a diversion center, up to six months of probation time may be revoked under subsection (b) if the probationer violates those rules and regulations. 1988 Op. Att’y Gen. No. U88-16 (rendered prior to 1989 amendment of subsection (b)).

The “two year” provision of subsection (b) would not apply to probation violations committed by persons assigned to a diversion center as a part of their probated sentence. 1988 Op. Att’y Gen. No. U88-16 (rendered prior to 1989 amendment of subsection (b)).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 572, 574, 578, 579.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1549-1568. 24B Criminal Law, §§ 2004, 2005, 2007.

**ALR.** — Who may institute proceedings to revoke probation, 21 ALR5th 275.

### 42-8-34.2. Delinquency of defendant in payment of fines, costs, or restitution or reparation; costs of garnishment.

(a) In the event that a defendant is delinquent in the payment of fines, costs, or restitution or reparation, as was ordered by the court as a condition of probation, the defendant’s probation officer is authorized, but not required, to execute a sworn affidavit wherein the amount of arrearage is set out. In addition, the affidavit shall contain a succinct statement as to what efforts the department has made in trying to collect the delinquent amount. The affidavit shall then be submitted to the sentencing court for approval. Upon signature and approval of the court, said arrearage shall then be collectable through issuance of a writ of fieri facias by the clerk of the sentencing court; and the department may enforce such collection through any judicial or other process or procedure which may be used by the holder of a writ of execution arising from a civil action.

(b) This Code section provides the state with remedies in addition to all other remedies provided for by law; and nothing in this Code section shall preclude the use of any other or additional remedy in any case.

(c) No clerk of any court shall be authorized to require any deposit of cost or any other filing or service fee as a condition to the filing of a garnishment action or other action or proceeding authorized under this Code section. In any such action or proceeding, however, the clerk of the court in which the action is filed shall deduct and retain all proper court costs from any funds paid into the treasury of the court, prior to any other disbursement of such funds so paid into court. (Code 1981, § 42-8-34.2,

enacted by Ga. L. 1990, p. 1331, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 1991, p. 1051, § 1.)

**Editor's notes.** — Ga. L. 1990, p. 1331, § 2 July 1, 1990, as well as sentences entered on provides that this Code section shall apply or after that date.  
with respect to sentences entered prior to

#### **42-8-35. Terms and conditions of probation.**

The court shall determine the terms and conditions of probation and may provide that the probationer shall:

- (1) Avoid injurious and vicious habits;
- (2) Avoid persons or places of disreputable or harmful character;
- (3) Report to the probation supervisor as directed;
- (4) Permit the supervisor to visit him at his home or elsewhere;
- (5) Work faithfully at suitable employment insofar as may be possible;
- (6) Remain within a specified location;

(7) Make reparation or restitution to any aggrieved person for the damage or loss caused by his offense, in an amount to be determined by the court. Unless otherwise provided by law, no reparation or restitution to any aggrieved person for the damage or loss caused by his offense shall be made if the amount is in dispute unless the same has been adjudicated;

(8) Make reparation or restitution as reimbursement to a municipality or county for the payment for medical care furnished the person while incarcerated pursuant to the provisions of Article 3 of Chapter 4 of this title. No reparation or restitution to a local governmental unit for the provision of medical care shall be made if the amount is in dispute unless the same has been adjudicated;

(9) Repay the costs incurred by any municipality or county for wrongful actions by an inmate covered under the provisions of paragraph (1) of subsection (a) of Code Section 42-4-71;

(10) Support his legal dependents to the best of his ability;

(11) Violate no local, state, or federal laws and be of general good behavior; and

(12) If permitted to move or travel to another state, agree to waive extradition from any jurisdiction where he may be found and not contest any effort by any jurisdiction to return him to this state. (Ga. L. 1956, p. 27, § 10; Ga. L. 1958, p. 15, § 11A; Ga. L. 1965, p. 413, § 3; Ga. L. 1992, p. 2125, § 4; Ga. L. 1992, p. 2942, § 2.)

**Cross references.** — Prohibition against possession of firearms by convicted felons, § 16-11-131. Payment of fine as condition to probation for felony conviction, § 17-10-8.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1992, paragraph (8), as added by Ga. L. 1992, p. 2942, was redesignated as paragraph (9) and the following paragraphs were redesignated accordingly, and "42-4-71" was substituted for "42-4-51"

in present paragraph (9).

**Law reviews.** — For article, "A Review of Georgia's Probation Laws," see 6 Ga. St. B.J. 255 (1970).

For note, "Limitations Upon Trial Court Discretion in Imposing Conditions of Probation," see 8 Ga. L. Rev. 466 (1974). For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 310 (1992).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### PROBATION TERMS AND CONDITIONS

1. IN GENERAL
2. AVOID INJURIOUS AND VICIOUS HABITS
3. CONFINEMENT TO SPECIFIED LOCATION
4. REPARATION OR RESTITUTION

##### REVOCATION OF PROBATION

1. IN GENERAL
2. PROCEDURAL REQUIREMENTS
3. VIOLATION OF RULES OR REGULATIONS

#### General Consideration

**Cited in** *Reynolds v. State*, 101 Ga. App. 715, 115 S.E.2d 214 (1960); *O'Quinn v. State*, 121 Ga. App. 231, 173 S.E.2d 409 (1970); *Raines v. State*, 130 Ga. App. 1, 202 S.E.2d 253 (1973); *State v. Collett*, 232 Ga. 668, 208 S.E.2d 472 (1974); *P.R. v. State*, 133 Ga. App. 346, 210 S.E.2d 839 (1974); *Gilbert v. State*, 137 Ga. App. 754, 225 S.E.2d 86 (1976); *Bennett v. State*, 141 Ga. App. 795, 234 S.E.2d 327 (1977); *Eubanks v. State*, 144 Ga. App. 152, 241 S.E.2d 6 (1977); *Smith v. State*, 148 Ga. App. 634, 252 S.E.2d 62 (1979); *Allen v. State*, 150 Ga. App. 109, 257 S.E.2d 5 (1979); *Stephens v. State*, 245 Ga. 835, 268 S.E.2d 330 (1980); *Cannon v. State*, 246 Ga. 754, 272 S.E.2d 709 (1980); *Johnson v. State*, 162 Ga. App. 226, 291 S.E.2d 94 (1982); *Malcom v. State*, 162 Ga. App. 587, 291 S.E.2d 756 (1982); *In re J.C.*, 163 Ga. App. 822, 296 S.E.2d 117 (1982); *Shaw v. State*, 164 Ga. App. 208, 296 S.E.2d 765 (1982); *Smith v. State*, 164 Ga. App. 384, 297 S.E.2d 738 (1982); *Davis v. State*, 172 Ga. App. 787, 324 S.E.2d 767 (1984); *Moore v. Kemp*, 809 F.2d 702 (11th Cir. 1987); *Wilson v. State*, 188 Ga. App. 731, 374 S.E.2d 345 (1988); *Burke v. State*, 201 Ga. App. 50, 410 S.E.2d 164 (1991).

#### Probation Terms and Conditions

##### 1. In General

**Authority of court to set terms and conditions.** — This section permits the court to determine the terms and conditions of probation, and lists ten conditions of probation. *Parkerson v. State*, 156 Ga. App. 440, 274 S.E.2d 799 (1980).

This section is not exclusive in its provisions, but places upon the court authority to set terms of probation and thereafter lists certain conditions which the court may impose if it sees fit. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959); *Gay v. State*, 101 Ga. App. 225, 113 S.E.2d 223 (1960); *Falkenhainer v. State*, 122 Ga. App. 478, 177 S.E.2d 380 (1970); *Marshall v. State*, 127 Ga. App. 805, 195 S.E.2d 469 (1972); *Geiger v. State*, 140 Ga. App. 800, 232 S.E.2d 109 (1976).

Trial judge is not limited to imposition of only those restrictions enumerated in this section. *Clackler v. State*, 130 Ga. App. 738, 204 S.E.2d 472 (1974); *Giddens v. State*, 156 Ga. App. 258, 274 S.E.2d 595 (1980); *Parkerson v. State*, 156 Ga. App. 440, 274 S.E.2d 799 (1980).

**Constitutionality of polygraph test requirement.** — A condition requiring proba-



**Probation Terms and Conditions (Cont'd)****1. In General (Cont'd)**

tioner to submit to polygraph tests does not violate defendants' fifth amendment rights, and the condition may be imposed, in the discretion of the trial judge, with no more than a general finding of the court that it is reasonably necessary to accomplish the purpose of probation. *Mann v. State*, 154 Ga. App. 677, 269 S.E.2d 863 (1980).

**Confinement not "incarceration."** — Sentence of defendant based on first offender treatment, to five years' probation, conditioned upon successive periods of confinement in a detention center, a diversion center, and in defendant's house under intensive supervision, was authorized and did not constitute "incarceration," which refers to continuous and uninterrupted custody in a jail or penitentiary. *Penaherrera v. State*, 211 Ga. App. 162, 438 S.E.2d 661 (1993).

**Condition precluding contact between perpetrator of sexual crime and victim.** — Imposition as a condition of probation that defendant who was convicted of aggravated child molestation have no direct or indirect contact with his seven-year-old daughter until she reached the age of majority was within the discretion of the court, and was not a violation of defendant's constitutional rights. *Tuttle v. State*, 215 Ga. App. 396, 450 S.E.2d 863 (1994).

**Condition of probation that defendant live with parents during course of probated sentences implicitly imposes restriction on defendant's parents, i.e., that they maintain a domicile for defendant, and is unenforceable.** *Ward v. State*, 248 Ga. 60, 281 S.E.2d 503 (1981).

**Condition that defendant wear special bracelet.** — The list in this section of conditions which may be imposed is not exclusive and the court had authority to impose the requirement that defendant wear a fluorescent pink plastic bracelet imprinted with the words "D.U.I. CONVICT." *Ballenger v. State*, 210 Ga. App. 627, 436 S.E.2d 793 (1993).

**Incarceration not imposable as condition for probation.** — In the absence of express statutory authority recognizing continuous and uninterrupted incarceration in a jail or penitentiary as a viable condition of proba-

tion, the imposition of any term of continuous and uninterrupted incarceration in a jail or penitentiary as a special condition of probation is unauthorized by law. *Pitts v. State*, 206 Ga. App. 635, 426 S.E.2d 257 (1992).

**2. Avoid Injurious and Vicious Habits****Prohibition against alcohol consumption.**

— Prohibition against consumption of alcohol as condition of probation is authorized by paragraph (1) of this section. An alcoholic is not exempt from such a condition. *Mock v. State*, 156 Ga. App. 763, 275 S.E.2d 393 (1980).

**Condition against engaging in profession for certain period.**

— Condition that defendant not engage in practice of law for a period of one year is within sound discretion of the court in probating the sentence, and is authorized under this section and § 42-8-34. *Yarbrough v. State*, 119 Ga. App. 46, 166 S.E.2d 35 (1969).

**3. Confinement to Specified Location**

**Diversion center.** — A probationer is not subject to prosecution for the felony offense of escape, after he fails to return to a diversion center from which he is given permission to leave. *Chandler v. State*, 257 Ga. 775, 364 S.E.2d 273 (1988).

**Banishment.** — Banishment of one convicted of crime from county or counties may be a reasonable condition of probation. *Parkerson v. State*, 156 Ga. App. 440, 274 S.E.2d 799 (1980).

However, no section or other authority grants jurisdiction to trial court to banish a person other than the convicted criminal as a condition of his probation. *Parkerson v. State*, 156 Ga. App. 440, 274 S.E.2d 799 (1980).

**Threat of refusal to abide by banishment.**

— Where trial court imposes 20 year sentence with ten years thereof to be probated, conditional upon banishment of defendant from judicial circuit, threats by defendant not to abide by probational banishment authorize judge to impose sentence of 20 years. *Garland v. State*, 160 Ga. App. 97, 286 S.E.2d 330 (1981).

**4. Reparation or Restitution****Constitutionality of restitution condition.**

— A sentence on a conviction for a fraudu-

lent disposition of crops subject to a landlord's lien under § 44-14-348, which provides for probation in lieu of a prison sentence on the condition that the landlord is repaid, is a valid and legal sentence and is not violative of Ga. Const. 1945, Art. I, Sec. I, Para. XXI (see Ga. Const. 1983, Art. I, Sec. I, Para. XXIII). *Davis v. State*, 53 Ga. App. 325, 185 S.E. 400 (1936).

**Probation may be conditioned upon payment of expenses** in accordance with the conditions of probation. *Giddens v. State*, 156 Ga. App. 258, 274 S.E.2d 595 (1980), cert denied, 450 U.S. 1026, 101 S. Ct. 1733, 68 L. Ed. 2d 220 (1981).

**Serving sentence outside detention center.** — The court may probate sentence to permit convicted person to serve sentence outside confines of place of detention "on such conditions as it may see fit," and this vests a broad power in the trial court, and restitution to an injured person or his property cannot be said to be a condition in violation of that power. *Henry v. State*, 77 Ga. App. 735, 49 S.E.2d 681 (1948).

**Notice and hearing requirements.** — Prior notice and an opportunity to be heard are prerequisite where restitution is ordered by court to be paid out of a probationer's weekly salary and the penalty for failure to pay is imprisonment. *Morgan v. Wofford*, 472 F.2d 822 (5th Cir. 1973).

Effect of fixing amount of restitution required to be paid under paragraph (7) of this section, without notice to the probationer and without any opportunity for probationer to question or appeal amount, especially where criminal sanctions may be involved, violates fourteenth amendment, since due process requires notice and an opportunity for hearing appropriate to the nature of the case when the state seeks to deprive a person of property or liberty. *Morgan v. Wofford*, 472 F.2d 822 (5th Cir. 1973).

**Contesting restitution condition.** — Recourse for defendant who does not agree to amount of restitution ordered by trial court is to contest the issue at the time the condition is imposed. *Johnson v. State*, 156 Ga. App. 511, 274 S.E.2d 669 (1980); *Johnson v. State*, 157 Ga. App. 155, 276 S.E.2d 667 (1981).

Where appellant failed to dispute or contest amount of restitution ordered by trial court, restitution was properly imposed with-

out an adjudication. *Cobb v. State*, 162 Ga. App. 314, 291 S.E.2d 390 (1982); *Patrick v. State*, 184 Ga. App. 260, 361 S.E.2d 251 (1987).

Where the defendant voiced no objection in the trial court to the interest charged as part of the amount of restitution, she may not complain of it on appeal. *Corbin v. State*, 202 Ga. App. 464, 415 S.E.2d 14 (1992).

Where defendant failed to dispute the amount of restitution ordered as a condition of probation for theft by taking, that the state failed to prove the amount at trial is of no consequence, because the state was only required to prove that defendant stole in excess of \$200.00 (now \$500.00) under § 16-8-12(a)(1). *Johnston v. State*, 165 Ga. App. 792, 302 S.E.2d 708 (1983).

A defendant is only entitled to adjudication of the restitutionary amount when that amount is in dispute. *Johnston v. State*, 165 Ga. App. 792, 302 S.E.2d 708 (1983); *Williams v. State*, 180 Ga. App. 854, 350 S.E.2d 837 (1986).

Where the amount of medical expenses of a juvenile assault victim is undisputed based on the uncontradicted testimony of the victim in the disposition hearing, there is no error in ordering restitution. *C.P. v. State*, 167 Ga. App. 374, 306 S.E.2d 688 (1983).

Appellant's plea of guilty to accusation and execution of written acknowledgment of conditions of probation did not constitute an agreement to the value of stolen property for purposes of restitution. *Johnson v. State*, 156 Ga. App. 511, 274 S.E.2d 669 (1980).

**Restitution as condition.** — While defendant may not be sentenced to make restitution, the court may make restitution a condition of probation. *Biddy v. State*, 138 Ga. App. 4, 225 S.E.2d 448 (1976).

**Determining nature of restitution order.** — Elements of T. 17, Ch. 14, may be used to discern nature of order of restitution made under this section. This can be done since under this section "restitution" was an authorized condition of probation and the enactment of T. 17, Ch. 14 "is merely a more detailed enactment regarding restitution." *Newton v. Fred Haley Poultry Farm*, 15 Bankr. 708 (Bankr. N.D. Ga. 1981).

**Condition for restoration of driver's license.** — Restitution of damages to other persons involved in an automobile accident may not be imposed as a condition for



**Probation Terms and Conditions (Cont'd)****4. Reparation or Restitution (Cont'd)**

restoration of a driver's license in such cases where the amount is in dispute, unless the same has been adjudicated, because a party may be guilty of violating the traffic laws and be found not liable in a civil suit for damages. *Payne v. State*, 138 Ga. App. 358, 226 S.E.2d 152 (1976).

**Restitution permissible despite scheduling obligation owed creditor.** — A trial court is empowered to stipulate as a condition of probation that restitution shall be made to the aggrieved party despite defendant having scheduled the obligation owing creditor in bankruptcy proceedings. *Marshall v. State*, 127 Ga. App. 805, 195 S.E.2d 469 (1972).

**Restitution based on untried charge improper.** — Where there was no accusation or evidence relating to a particular theft, trial court cannot order restitution for that theft as a condition of probation even if the court was aware of an untried charge relating to that theft. *Robinson v. State*, 169 Ga. App. 763, 315 S.E.2d 277 (1984).

**Repayment of salary.** — The trial court may, as a condition of probation, require repayment of the salary received by a county officer while he was suspended. *LaPann v. State*, 167 Ga. App. 288, 306 S.E.2d 373 (1983).

**Restitution properly adjudicated.** — See *Lee v. State*, 166 Ga. App. 485, 304 S.E.2d 446 (1983).

**Revocation of Probation****1. In General**

**Revocation of purported probation sentence.** — Sentences for criminal offenses should be certain, definite, and free from ambiguity, and, where the contrary is the case, benefit of doubt should be given to the accused. Hence, trial court erred in revoking purported probation sentence since construed as a whole, the sentence was an alternative one and the defendant was to be discharged upon payment of fines and costs. *Favors v. State*, 95 Ga. App. 318, 97 S.E.2d 613 (1957).

**Service of sentence on probation as privilege.** — Service of sentence on probation is conferred as privilege and cannot be demanded as a matter of right, but this does

not mean that a defendant's liberty is something that can be the subject matter of whim or fancy of the trial judge. *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951) (decided under former Code 1933, §§ 27-2702 and 27-2705 prior to revision by Ga. L. 1956, p. 27, §§ 1, 21).

**2. Procedural Requirements**

**Authority of judge to suspend or probate sentence.** — A judge imposing a sentence is granted power to suspend or probate the sentence under such rules and regulations as he thinks proper. *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951).

The judge has the right and authority to revoke the suspension or probation, after notice and a hearing, when the defendant violates any of the rules and regulations prescribed by the court. *Simmons v. State*, 96 Ga. App. 718, 101 S.E.2d 111 (1957) (decided under former Code 1933, §§ 27-2702 and 27-2705, prior to revision by Ga. L. 1956, p. 27, §§ 1, 21).

**Notice or hearing required for sentence revocation.** *Balkcom v. Gunn*, 206 Ga. 167, 56 S.E.2d 482 (1949) (decided under former Code 1933, T. 27, including §§ 27-2702 and 27-2705, prior to revision by Ga. L. 1956, p. 27, §§ 1, 21).

**Sufficiency of notice.** — Notice must be sufficient to inform defendant of the manner in which he has violated his parole and give him an opportunity to defend. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

**Some evidence required for revocation of probation.** — While the trial court has a wide discretion in revoking a probated sentence, and while only slight evidence will support a judgment of revocation, some evidence that the defendant violated the terms of his probated sentence as charged in the notice given him of the revocation hearing is required. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959); *Gay v. State*, 101 Ga. App. 225, 113 S.E.2d 223 (1960).

**Evidence held insufficient.** — Evidence was insufficient where notice contained in special order of arrest charged defendant with manufacturing illicit whiskey, but no evidence was introduced; mere fact that defendant was operating a truck loaded with sugar, and he refused to give name of purchaser or seller of the sugar and had no bill



of lading or bill of sale for the sugar, which facts were perfectly consistent with the defendant's contention that he was doing some hauling, was of itself not sufficient to authorize revocation of probation order. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

Where notice contained in order of arrest failed to charge defendant with violation of the provision of the probation order prohibiting him from leaving the state without permission, mere fact that he was stopped in Alabama was not sufficient ground for revocation thereof. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

**Matters to be considered in revoking probation.** — Since the court cannot revoke a probated sentence unless the sentence has conditions sufficiently definite to be enforceable, and unless the conditions have not been complied with, and since the defendant is entitled to notice and an opportunity to be heard on the charge which is brought against him, only those alleged violations which are terms of the original sentence, and notice of the violation of which has been given the probationer, may be considered by the court on the hearing to revoke the probated sentence. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

### 3. Violation of Rules or Regulations

**Need for prescribed rules and regulations.** — Where no rules or regulations are prescribed in the alleged suspended or probated sentence, and no violation of a prescribed rule or regulation is alleged, the court is without authority to order the defendant incarcerated upon the theory that he has violated the terms and conditions of a probation sentence. *Morgan v. Foster*, 208 Ga. 630, 68 S.E.2d 583 (1952); *Simmons v. State*, 96 Ga. App. 718, 101 S.E.2d 111 (1957) (decided under former Code 1933, §§ 27-2702, 27-2705, and 27-2706, prior to revision by Ga. L. 1956, p. 27, §§ 1, 21).

**Probated sentences must show rules and regulations prescribed** so that a violation of such rules and regulations will revoke probation. *Simmons v. State*, 96 Ga. App. 718, 101 S.E.2d 111 (1957) (decided under former Code 1933, §§ 27-2702 and 27-2705, prior to revision by Ga. L. 1956, p. 27, §§ 1, 21); *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

**Discretion to impose non-specified restrictions.** — The court has authority to impose restrictions not specifically listed in this section, and among them the restriction that the defendant shall not violate the penal laws of the state. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

**Strict construction.** — Statutes providing for suspension of a sentence or probation of defendant must be strictly followed. *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951) (decided under former Code 1933, §§ 27-2702 and 27-2705, prior to revision by Ga. L. 1956, p. 27, § 1, 21).

**Language held not so vague as to be unenforceable.** — A provision in a probation sentence that the "sentence is suspended on payment of fine and on the further condition that defendant not violate laws of this state, and until further order of this court," is not so vague, indefinite, ambiguous, and uncertain as to be unenforceable; the laws of this state being fixed by statute and presumed to be within the knowledge of every competent person. *Bryant v. State*, 89 Ga. App. 891, 81 S.E.2d 556 (1954) (decided under former Code 1933, § 27-2705).

**Probation sentence held unenforceable.** — If the words, "maintain a correct life" are intended to impose any condition upon the defendant over and beyond compliance with the rules prescribed for his conduct by the court, the words are too vague, indefinite, and uncertain to be given any construction or application. *Morgan v. Foster*, 208 Ga. 630, 68 S.E.2d 583 (1952) (decided under former Code 1933, §§ 27-2705 and 27-2706, prior to revision by Ga. L. 1956, p. 27, § 21).

**Condition applicable for probated sentence applies to suspended sentence.** — A condition which would be authorized in the case of a probated sentence would be authorized in the case of a suspended sentence. *Falkenhainer v. State*, 122 Ga. App. 478, 177 S.E.2d 380 (1970).

**Releasing defendant without prescribing conditions or rules.** — Where no conditions or rules are prescribed by the court for the conduct of the defendant, his release at direction of the court upon payment of a fine is not a suspended or probated sentence, but an unconditional discharge. The words, "until further order of the court," appearing in the sentence, are insufficient to constitute a suspended sentence or proba-

**Revocation of Probation (Cont'd)****3. Violation of Rules or****Regulations (Cont'd)**

tion. *Morgan v. Foster*, 208 Ga. 630, 68 S.E.2d 583 (1952) (decided under former

Code 1933, §§ 27-2705 and 27-2706 prior to revision by Ga. L. 1956, p. 27, § 21).

**OPINIONS OF THE ATTORNEY GENERAL**

**Imposition of terms by board.** — The board or its agents may not place on a prisoner in connection with his probation any terms or conditions not required of him by court order passed by the trial judge at the conclusion of the hearing held for the purpose of considering his probation. 1958-59 Op. Att'y Gen. p. 223.

The board, acting through the director of probation (now commissioner of corrections) and probation officers, is without authority to require of probationers under its supervision the execution of any waiver of any right of extradition or otherwise, or to impose upon them any condition not placed upon them by the trial judge in his probation order. 1958-59 Op. Att'y Gen. p. 223.

**Screening for virus as probation condition.** — Confidential screening for the HTLV-III/LAV virus in convicted prostitutes may be required: (1) as a health measure by the Department of Human Resources, or (2) as a condition of probation by the sentencing court. 1986 Op. Att'y Gen. No. 86-19.

**Imposition of fine payment.** — A superior court judge may impose payment of a fine as a term and condition of probation for a defendant being treated under Art. 3 of this chapter. 1975 Op. Att'y Gen. No. U75-42.

**Banishment as condition.** — The Supreme Court of this state has upheld a trial court's authority to impose banishment as a condition of probation. 1979 Op. Att'y Gen. No. U79-8.

**List not exclusive.** — The list of conditions of probation in this section is not exclusive. 1979 Op. Att'y Gen. No. U79-8.

**Community service as condition.** — A probated sentence providing for specified community service as a condition of probation is permissible. 1979 Op. Att'y Gen. No. U79-8.

**Probationer contributing for probation supervisors' insurance.** — A probationer can be required to pay by court order, as a condition of his/her probation, a reasonable amount toward the cost of maintaining insurance to protect probation supervisors

from personal liability should probationers be injured while performing court-ordered community service. 1983 Op. Att'y Gen. No. 83-18.

**Covenant not to sue probation supervisors.** — Probationer may be required to enter into covenant not to sue probation supervisors personally. A sentencing court may, in its discretion, require a probationer to enter into, as a condition of probation, a covenant not to sue probation supervisors in their personal capacity if the probationer is injured while performing court-ordered community service work. 1983 Op. Att'y Gen. No. 83-18.

**Reasonable supervision fee as condition.** — Probationer's agreement to pay supervision fee should be obtained at time of sentencing and should be recorded. But, regardless of whether probationer agrees, he can be required to pay reasonable supervision fee as condition of probation. 1981 Op. Att'y Gen. No. 81-100.

The statutory conditions in this Code section are not exclusive, and trial courts may, as a condition of probation, impose a probation supervision fee. 1985 Op. Att'y Gen. No. U85-4.

**Collection of supervision fees by Department.** — Department of Offender Rehabilitation (Corrections) may not on its own initiative collect supervision fee from probationers. 1981 Op. Att'y Gen. No. 81-100.

**Withholding "collection fee" from fines to offset costs.** — Probation supervision fee collected pursuant to probation order of sentencing court does not have a statutory premise. Therefore, such a fee does not have to be paid into state treasury but, if permitted by probation order, could be retained by Department of Offender Rehabilitation (Corrections). 1981 Op. Att'y Gen. No. 81-100.

**Use of restitution funds.** — Pursuant to this section, funds collected for the purpose of restitution may be used only for that purpose. 1971 Op. Att'y Gen. No. 71-182.

**Returning funds to probationer.** — When



a trust of funds collected pursuant to this section fails of accomplishment, the funds should be returned to the probationer who is similar to the grantor of an implied or resulting trust. Op. Att'y Gen. No. 71-182.

**Return of small fund amount where probationer not found.** — Where neither the

intended recipient nor the probationer can be found, and the sum collected pursuant to this section is quite small, the money should continue to be held, since the escheat procedure would consume the fund. 1971 Op. Att'y Gen. No. 71-182.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1549-1568.

**ALR.** — Power to impose sentence with direction that after defendant shall have served part of time he be placed on probation for the remainder of term, 147 ALR 656.

Propriety of conditioning probation or suspended sentence on defendant's refraining from political activity, protest, or the like, 45 ALR3d 1022.

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension or sentence thereon, 58 ALR3d 1156.

Propriety, in imposing sentence for original offense after revocation of probation, of considering acts because of which probation was revoked, 65 ALR3d 1100.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim, 79 ALR3d 976.

Validity of requirement that, as condition of probation, indigent defendant reimburse defense costs, 79 ALR3d 1025.

Propriety of conditioning probation upon defendant's posting of bond guaranteeing compliance with terms of probation, 79 ALR3d 1068.

Validity of requirement that, as condition of probation, defendant submit to warrantless searches, 79 ALR3d 1083.

Propriety of conditioning probation on defendant's not associating with particular person, 99 ALR3d 967.

Propriety of conditioning probation on defendant's serving part of probationary period in jail or prison, 6 ALR4th 446.

Propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants, 19 ALR4th 1251.

Power of court to revoke probation for acts committed after imposition of sentence but prior to commencement of probation term, 22 ALR4th 755.

Propriety of conditioning probation on defendant's not entering specified geographical area, 28 ALR4th 725.

Propriety of conditioning probation on defendant's submission to polygraph or other lie detector testing, 86 ALR4th 709.

Propriety of conditioning probation on defendant's submission to drug testing, 87 ALR4th 929.

Propriety, in criminal case, of Federal District Court order restricting defendant's right to re-enter or stay in United States, 94 ALR Fed. 619.

### 42-8-35.1. Special alternative incarceration.

(a) In addition to any other terms or conditions of probation provided for under this chapter, the trial judge may provide that probationers sentenced for felony offenses committed on or after July 1, 1993, to a period of time of not less than one year on probation as a condition of probation must satisfactorily complete a program of confinement in a "special alternative incarceration—probation boot camp" unit of the department for a period of 120 days computed from the time of initial confinement in the unit; provided, however, the department may release the defendant upon service of 90 days in recognition of excellent behavior.



(b) Before a court can place this condition upon the sentence, an initial investigation will be completed by the probation officer which will indicate that the probationer is qualified for such treatment in that the individual does not appear to be physically or mentally disabled in a way that would prevent him from strenuous physical activity, that the individual has no obvious contagious diseases, that the individual is not less than 17 years of age nor more than 30 years of age at the time of sentencing, and that the department has granted provisional approval of the placement of the individual in the "special alternative incarceration—probation boot camp" unit.

(c) In every case where an individual is sentenced under the terms of this Code section, the sentencing court shall, within its probation order, direct the department to arrange with the sheriff's office in the county of incarceration to have the individual delivered to a designated unit of the department within a specific date not more than 15 days after the issuance of such probation order by the court.

(d) At any time during the individual's confinement in the unit, but at least five days prior to his expected date of release, the department will certify to the trial court as to whether the individual has satisfactorily completed this condition of probation.

(e) Upon the receipt of a satisfactory report of performance in the program from the department, the trial court shall release the individual from confinement in the "special alternative incarceration—probation boot camp" unit. However, the receipt of an unsatisfactory report will be grounds for revocation of the probated sentence as would any other violation of a condition or term of probation.

(f) The satisfactory report of performance in the program from the department shall, in addition to the other requirements specified in this Code section, require participation of the individual confined in the unit in such adult education courses necessary to attain the equivalency of a grade five competency level as established by the State Board of Education for elementary schools. Those individuals who are mentally disabled as determined by initial testing are exempt from mandatory participation. After the individual is released from the unit, it shall be a special condition of probation that the individual participate in an education program in the community until grade five level competency is achieved or active probation supervision terminates. It shall be the duty of the department to certify to the trial court that such individual has satisfactorily completed this condition of probation while on active probation supervision. The receipt of an unsatisfactory report may be grounds for revocation of the probated sentence as would any other violation of a condition or term of probation. Under certain circumstances, the probationer may be exempt from this requirement if it is determined by the probation officer that community education resources are inaccessible to the probationer. (Ga. L. 1982, p.

1097, § 1; Code 1981, § 42-8-35.1, enacted by Ga. L. 1982, p. 1097, § 2; Ga. L. 1983, p. 3, § 31; Ga. L. 1984, p. 446, § 1; Ga. L. 1987, p. 654, § 1; Ga. L. 1991, p. 1751, § 1; Ga. L. 1993, p. 444, § 1; Ga. L. 1993, p. 1664, § 1; Ga. L. 1995, p. 1302, § 14.)

**The 1995 amendment**, effective July 1, 1995, substituted "disabled" for "handicapped" in subsection (b) and in the second sentence of subsection (f).

**Editor's notes.** — Ga. L. 1982, p. 2283, § 2 also enacted a Code Section 42-8-35.1, which

was redesignated as Code Section 42-8-35.2 by Ga. L. 1983, p. 3, § 31.

**Law reviews.** — For note on 1991 amendment of this Code section, see 8 Ga. St. U.L. Rev. 161 (1992).

### JUDICIAL DECISIONS

**Incarceration not impossible as condition for probation.** — In the absence of express statutory authority recognizing continuous and uninterrupted incarceration in a jail or penitentiary as a viable condition of probation, the imposition of any term of continuous and uninterrupted incarceration in a jail or penitentiary as a special condition of probation is unauthorized by law. *Pitts v. State*, 206 Ga. App. 635, 426 S.E.2d 257 (1992).

**Penalty for violation of diversion center regulations.** — It was error to hold that a probationer's failure to abide by the diversion center's regulations made him liable for the felony offense of escape rather than for the mere revocation of his probation. Unsatisfactory performance in the program would

subject the probationer to revocation of probation as specified by § 42-8-38; however an alternative to revocation of probation would be the imposition of the more severe sanctions of § 16-10-52(a)(3). Where any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of two penalties administered. *Chandler v. State*, 257 Ga. 775, 364 S.E.2d 273 (1988).

**A person convicted of a misdemeanor** may not be sentenced to attend a boot camp as a condition of probation. *Johnson v. State*, 267 Ga. 77, 475 S.E.2d 595 (1996).

**Cited in** *Penaherrera v. State*, 211 Ga. App. 162, 438 S.E.2d 661 (1993).

### 42-8-35.2. Special term of probation; when imposed; revocation; suspension.

(a) Notwithstanding any other provisions of law, the court, when imposing a sentence of imprisonment after a conviction of a violation of subsection (b) or (d) of Code Section 16-13-30 or after a conviction of a violation of Code Section 16-13-31, shall impose a special term of probation of three years in addition to such term of imprisonment; provided, however, upon a second or subsequent conviction of a violation of the provisions of such Code sections as stated in this subsection, the special term of probation shall be six years in addition to any term of imprisonment.

(b) A special term of probation imposed under this Code section may be revoked if the terms and conditions of probation are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special term of probation and the resulting new term of imprisonment shall not be diminished by the time which was spent on special probation. A person whose special term of probation has been revoked may be required to serve all or part of the remainder of the new

term of imprisonment. A special term of probation provided for in this Code section shall be in addition to, and not in lieu of, any other probation provided for by law and shall be supervised in the same manner as other probations as provided in this chapter.

(c) Upon written application by the probationer to the trial court, the court may, in its discretion, suspend the balance of any special term of probation, provided that at least one-half of said special term of probation has been completed and all fines associated with the original sentence have been paid and all other terms of the original sentence and the terms of the special probation have been met by the probationer. (Ga. L. 1982, p. 2283, § 1; Code 1981, § 42-8-35.1, enacted by Ga. L. 1982, p. 2283, § 2; Code 1981, § 42-8-35.2, as redesignated by Ga. L. 1983, p. 3, § 31; Ga. L. 1997, p. 143, § 42.)

**The 1997 amendment**, effective March 28, 1997, part of an Act to correct errors and omissions in the Code, substituted "subsection (b) or (d)" for "subsection (b), (d), or (f)" in subsection (a).

**Editor's notes.** — The 1983 amendment,

effective January 25, 1983, redesignated this Code section, which was enacted as Code Section 42-8-35.1, as Code Section 42-8-35.2, since Ga. L. 1982, p. 1097, § 2 also enacted a Code Section 42-8-35.1, and revised language.

#### RESEARCH REFERENCES

**ALR.** — Defendant's right to credit for time spent in halfway house, rehabilitation

center, or other restrictive environment as condition of probation, 24 ALR4th 789.

#### 42-8-35.3. Conditions of probation for stalking or aggravated stalking.

Notwithstanding any other terms or conditions of probation which may be imposed, a court sentencing a defendant to probation for a violation of Code Section 16-5-90 or 16-5-91 may impose one or more of the following conditions on such probation:

(1) Prohibit the defendant from engaging in conduct in violation of Code Section 16-5-90 or 16-5-91;

(2) Require the defendant to undergo a mental health evaluation and, if it is determined by the court from the results of such evaluation that the defendant is in need of treatment or counseling, require the defendant to undergo mental health treatment or counseling by a court approved mental health professional, mental health facility, or facility of the Department of Human Resources. Unless the defendant is indigent, the cost of any such treatment shall be borne by the defendant; or

(3) Prohibit the defendant from entering or remaining present at the victim's school, place of employment, or other specified places at times when the victim is present. (Code 1981, § 42-8-35.3, enacted by Ga. L. 1993, p. 1534, § 4.)



**Law reviews.** — For note on 1993 enactment of this section, see 10 Ga. St. U.L. Rev. 95 (1993).

#### **42-8-35.4. Confinement in probation detention center.**

(a) In addition to any other terms and conditions of probation provided for in this article, the trial judge may require that a defendant convicted of a felony and sentenced to a period of not less than one year on probation or a defendant who has been previously sentenced to probation for a forcible misdemeanor as defined in paragraph (7) of Code Section 16-1-3 or a misdemeanor of a high and aggravated nature and has violated probation or other probation alternatives and is subsequently sentenced to a period of not less than one year on probation shall complete satisfactorily, as a condition of that probation, a program of confinement in a probation detention center. Probationers so sentenced will be required to serve a period of confinement as specified in the court order, which confinement period shall be computed from the date of initial confinement in the probation detention center.

(b) The court shall determine that the defendant is at least 17 years of age at the time of sentencing.

(c) During the period of confinement, the department may transfer the probationer to other facilities in order to provide needed physical and mental health care or for other reasons essential to the care and supervision of the probationer or as necessary for the effective administration and management of its facilities. (Code 1981, § 42-8-35.4, enacted by Ga. L. 1995, p. 627, § 1.)

**Effective date.** — This Code section became effective April 18, 1995.

#### **42-8-35.5. Confinement in probation diversion center.**

(a) In addition to any other terms and conditions of probation provided in this article, the trial judge may require that probationers sentenced to a period of not less than one year on probation shall satisfactorily complete, as a condition of that probation, a program in a probation diversion center. Probationers so sentenced will be required to serve a period of confinement as specified in the court order, which confinement period shall be computed from the date of initial confinement in the diversion center.

(b) The court shall determine that the defendant is at least 17 years of age at the time of sentencing, is capable both physically and mentally of maintaining paid employment in the community, and does not unnecessarily jeopardize the safety of the community.

(c) The department may assess and collect room and board fees from diversion center program participants at a level set by the department. (Code 1981, § 42-8-35.5, enacted by Ga. L. 1995, p. 627, § 1.)

**Effective date.** — This Code section became effective April 18, 1995.

**42-8-35.6. Family violence intervention program or counseling related to family violence as condition of probation.**

Notwithstanding any other terms or conditions of probation which may be imposed, a court sentencing a defendant to probation for an offense involving family violence as such term is defined in Code Section 19-13-1 shall, to the extent that services are available, require as a condition of probation that the defendant participate in a court approved family violence intervention program or receive counseling related to family violence. Unless the defendant is indigent, the cost of such participation in the program or counseling shall be borne by the defendant. (Code 1981, § 42-8-35.6, enacted by Ga. L. 1996, p. 1113, § 2.)

**Effective date.** — This Code section became effective July 1, 1996.

**42-8-36. Duty of probationer to inform probation supervisor of residence and whereabouts; violations; unpaid moneys.**

(a) (1) Any other provision of this article to the contrary notwithstanding, it shall be the duty of a probationer, as a condition of probation, to keep his probation supervisor informed as to his residence. Upon the recommendation of the probation supervisor, the court may also require, as a condition of probation and under such terms as the court deems advisable, that the probationer keep the probation supervisor informed as to his whereabouts. The failure of a probationer to report to his probation supervisor as directed or a return of non est inventus or other return to a warrant, for the violation of the terms and conditions of probation, that the probationer cannot be found in the county that appears from the records of the probation supervisor to be the probationer's county of residence shall automatically suspend the running of the probated sentence until the probationer shall personally report to the probation supervisor, is taken into custody in this state, or is otherwise available to the court; and such period of time shall not be included in computing creditable time served on probation or as any part of the time that the probationer was sentenced to serve. The effective date of the tolling of the sentence shall be the date that the officer returns the warrant showing non est inventus. Any officer authorized by law to issue or serve warrants may return the warrant for the absconded probationer showing non est inventus.

(2) In addition to the provisions of paragraph (1) of this subsection, if the probation supervisor submits an affidavit to the court stating that a probationer has absconded and cannot be found, the running of the probated sentence shall be suspended effective on the date such affidavit is submitted to the court and continuing until the probationer shall personally report to the probation supervisor; is taken into custody in this state, or is otherwise available to the court.

(b) Any unpaid fines, restitution, or any other moneys owed as a condition of probation shall be due when the probationer is arrested; but, if the entire balance of his probation is revoked, all the conditions of probation, including moneys owed, shall be negated by his imprisonment. If only part of the balance of the probation is revoked, the probationer shall still be responsible for the full amount of the unpaid fines, restitution, and other moneys upon his return to probation after release from imprisonment. (Ga. L. 1958, p. 15, § 9; Ga. L. 1982, p. 3, § 42; Ga. L. 1984, p. 1317, § 1; Ga. L. 1986, p. 492, § 1; Ga. L. 1987, p. 455, § 1; Ga. L. 1989, p. 452, § 1; Ga. L. 1992, p. 6, § 42.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1986, "or" was substituted for "nor" following "served on probation" in the third sentence of present subsection (a)(1).

**Law reviews.** — For article, "A Review of Georgia's Probation Laws," see 6 Ga. St. B.J. 255 (1970).

For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 287 (1989).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Penal Code 1910, § 1081(4) are included in the annotations for this Code section.

**Constitutionality.** — The last sentence of this section (now the last sentence of paragraph (1) of subsection (a) of this section) constitutes a denial of due process. *Hughes v. Hinks*, 249 Ga. 416, 291 S.E.2d 545 (1982).

**Construction with § 17-10-10.** — Section 17-10-10, relating to concurrent service of sentences, must yield to this section if there is any conflict between them. *Downs v. State*, 163 Ga. App. 485, 295 S.E.2d 152 (1982).

**Notice and hearing required for probation revocation.** — Where a person is placed under a probation sentence, probation cannot be revoked without notice to probationer and an opportunity to be heard on the question as to whether he violated its terms. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972).

**The minimum requirements of due process for parole revocation** are a written statement by the fact finders as to the evi-

dence relied on and reasons for revoking parole. *Reed v. State*, 151 Ga. App. 224, 259 S.E.2d 209 (1979).

**The hearing required need not meet the requisites of a jury trial;** the proceedings may be informal or summary. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972).

**The judge is the sole trier of fact** and where there is even slight evidence the appellate court will not interfere with the revocation unless there has been an abuse of discretion. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972).

**The order revoking probation must state the evidence** relied upon and the reasons for revocation. *Rey v. State*, 156 Ga. App. 474, 274 S.E.2d 822 (1980).

**Judge's discretion considerable.** — The discretion of the judge in revoking probation will not be interfered with unless grossly abused. *Olsen v. State*, 21 Ga. App. 795, 95 S.E. 269 (1918); *Towns v. State*, 25 Ga. App. 419, 103 S.E. 724, cert. denied, 25 Ga. App. 841, S.E. (1920).



**Leaving jurisdiction of court is ground for revocation.** *Shamblin v. Penn*, 148 Ga. 592, 97 S.E. 520 (1918).

**Limitation upon power to withdraw parole.** — A parole cannot lawfully be revoked as a mere matter of caprice. In such hearing the judge is the sole judge of the credibility of the witnesses, but he is not permitted to withdraw a parole unless there is sufficient evidence to authorize a finding that one or more of the conditions upon which the parole was granted has been violated. *Williams v. State*, 162 Ga. 327, 133 S.E. 843 (1926).

Where it cannot be determined whether the criminal act charged against the probationer as in violation of his parole was committed prior to the imposition of the sentence or subsequent thereto, a finding revoking the parole would be contrary to law

and would not be authorized. *Williams v. State*, 162 Ga. 327, 133 S.E. 843 (1926).

**Tolling of a probated sentence.** — Where a probation warrant was returned non est inventus, the tolling function initiated under paragraph (1) of subsection (a) was not interrupted by defendant's arrest on unrelated charges in another county. *Cauldwell v. State*, 211 Ga. App. 417, 439 S.E.2d 90 (1993).

**The order revoking probationer's parole is not a final judgment** as is subject to review under Art. 2, Ch. 6, T. 5. *Antonopoulos v. State*, 151 Ga. 466, 107 S.E. 156 (1921); *Troup v. State*, 27 Ga. App. 636, 109 S.E. 681 (1921); *Jackson v. State*, 27 Ga. App. 648, 110 S.E. 423 (1921).

**Cited in** *Dilas v. State*, 159 Ga. App. 39, 282 S.E.2d 690 (1981); *Cooper v. State*, 160 Ga. App. 287, 287 S.E.2d 284 (1981).

## OPINIONS OF THE ATTORNEY GENERAL

**Tolling of probated sentence.** — This section provides for the tolling of a probated sentence when the specified returns to a warrant have been made; the mere issuance of an arrest warrant does not toll the pro-

bated sentence; however, a probated sentence is suspended automatically upon an entry of one of the specified returns to such warrant. 1968 Op. Att'y Gen. No. 68-303.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1549-1568.

**ALR.** — Imposition or enforcement of sentence which has been suspended without authority, 141 ALR 1225.

Right of defendant sentenced after revocation of probation to credit for jail time served as a condition of probation, 99 ALR3d 781.

Admissibility of hearsay evidence in probation revocation hearings, 11 ALR4th 999.

## 42-8-37. Effect of termination of period of probation; review of cases of persons receiving probated sentence; reports.

(a) Upon the termination of the period of probation, the probationer shall be released from probation and shall not be liable to sentence for the crime for which probation was allowed; provided, however, the foregoing shall not be construed to prohibit the conviction and sentencing of the probationer for the subsequent commission of the same or a similar offense or for the subsequent continuation of the offense for which he was previously sentenced. The court may at any time cause the probationer to appear before it to be admonished or commended and, when satisfied that its action would be for the best interests of justice and the welfare of society, may discharge the probationer from further supervision.

(b) Upon the request of the chief judge of the court from which said person was sentenced, the case of each person receiving a probated sentence of more than two years shall be reviewed by the probation supervisor responsible for that case after service of two years on probation, and a written report of the probationer's progress shall be submitted to the sentencing court along with the supervisor's recommendation as to early termination. Upon the request of the chief judge of the court from which said person was sentenced, each such case shall be reviewed and a written report submitted annually thereafter, or more often if required, until the termination, expiration, or other disposition of the case. (Ga. L. 1956, p. 27, § 11; Ga. L. 1972, p. 604, § 9; Ga. L. 1985, p. 516, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579.

**ALR.** — Governor's authority to remit forfeited bail bond, 77 ALR2d 988.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1549-1568.

#### **42-8-38. Arrest of probationer for violation of terms of probation; hearing; disposition of charge; procedure where probation revoked in county other than that of conviction.**

(a) Whenever, within the period of probation, a probation supervisor believes that a probationer under his supervision has violated his probation in a material respect, he may arrest the probationer without warrant, wherever found, and return him to the court granting the probation or, if under supervision in a county or judicial circuit other than that of conviction, to a court of equivalent original criminal jurisdiction within the county wherein the probationer resides for purposes of supervision. Any officer authorized by law to issue warrants may issue a warrant for the arrest of the probationer upon the affidavit of one having knowledge of the alleged violation, returnable forthwith before the court in which revocation proceedings are being brought.

(b) The court, upon the probationer being brought before it, may commit him or release him with or without bail to await further hearing or it may dismiss the charge. If the charge is not dismissed at this time, the court shall give the probationer an opportunity to be heard fully at the earliest possible date on his own behalf, in person or by counsel, provided that, if the revocation proceeding is in a court other than the court of the original criminal conviction, the sentencing court shall be given ten days' written notice prior to a hearing on the merits.

(c) After the hearing, the court may revoke, modify, or continue the probation. If the probation is revoked, the court may order the execution of the sentence originally imposed or of any portion thereof. In such event, the time that the defendant has served under probation shall be considered

as time served and shall be deducted from and considered a part of the time he was originally sentenced to serve.

(d) In cases where the probation is revoked in a county other than the county of original conviction, the clerk of court in the county revoking probation may record the order of revocation in the judge's minute docket, which recordation shall constitute sufficient permanent record of the proceedings in that court. The clerk shall send one copy of the order revoking probation to the department to serve as a temporary commitment and shall send the original order revoking probation and all other papers pertaining thereto to the county of original conviction to be filed with the original records. The clerk of court of the county of original conviction shall then issue a formal commitment to the department. (Ga. L. 1956, p. 27, § 12; Ga. L. 1960, p. 857, § 1; Ga. L. 1966, p. 440, § 1.)

**Law reviews.** — For article, "A Review of Georgia's Probation Laws," see 6 Ga. St. B.J. 255 (1970).

For comment criticizing *Mercer v. Hopper*, 233 Ga. 620, 212 S.E.2d 799 (1975), see 27 Mercer L. Rev. 325 (1975).

## JUDICIAL DECISIONS

### ANALYSIS

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##### DECISIONS UNDER PRIOR LAW

1. DECISIONS UNDER CODE
2. DECISIONS UNDER CODE

### General Consideration

**Scope of section.** — Where defendant was sentenced to the county jail when not at

work, he could not be considered to be on probation, thus an action by the trial court to modify and extend his sentence under this section was a nullity, since this section



relates solely to revocation of probation. *Howell v. State*, 160 Ga. App. 562, 287 S.E.2d 573 (1981).

**When probation may be revoked or modified.** — The probated portion of a sentence may be revoked or modified at any time during the term of the probated sentence after hearing and finding of probation violation. *Logan v. Lee*, 247 Ga. 608, 278 S.E.2d 1 (1981).

**Determination of revocation.** — Even where condition of probation has not been complied with, circumstances of individual defendant must be taken into consideration in determining whether revocation is warranted. *Malcom v. State*, 162 Ga. App. 587, 291 S.E.2d 756 (1982).

**Increase of sentence.** — While the trial court has jurisdiction to change or modify the terms of the original sentence, it cannot increase the sentence originally passed. *Howell v. State*, 160 Ga. App. 562, 287 S.E.2d 573 (1981).

**Probationary status only to be considered.** — Subsection (c) limits the power of the trial court to a decision affecting only the probationary status of the previously convicted probationer. In no way does it provide for the imposition of a sentence of any kind based upon the charge underlying an alleged violation of the terms of a previously ordered probation. *Abney v. State*, 170 Ga. App. 265, 316 S.E.2d 845 (1984).

**Violation of diversion center regulations.** — It was error to hold that a probationer's failure to abide by the diversion center's regulations made him liable for the felony offense of escape rather than for the mere revocation of his probation. Unsatisfactory performance in the program would subject the probationer to revocation of probation as specified by this Code section; however an alternative to revocation of probation would be the imposition of the more severe sanctions of § 16-10-52(a)(3). Where any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of two penalties administered. *Chandler v. State*, 257 Ga. 775, 364 S.E.2d 273 (1988).

**Effect of failure to revoke probation on subsequent criminal trial.** — That the quantum of proof necessary to revoke probation has been changed from "slight evidence" to "a preponderance of the evidence" does not

affect the rule that a ruling in favor of the probationer, continuing rather than revoking his probation, has no collateral estoppel effect in a subsequent criminal trial. *State v. Jones*, 196 Ga. App. 896, 397 S.E.2d 209 (1990).

**Unambiguous revocation of probation not subject to subsequent adjustment.** — Where defendant received a sentence which unambiguously revoked his prior probation, he fully served the time imposed therein, and there was no indication in the sentence that any portion of his probation was to be reinstated upon his release, that sentence was fully satisfied when he was released from jail, and court's order subsequently revoking his probation was invalid, as there was nothing left to revoke. *Hulen v. State*, 207 Ga. App. 465, 428 S.E.2d 405 (1993).

**Cited in** *King v. Adams*, 410 F.2d 455 (5th Cir. 1969); *Young v. State*, 123 Ga. App. 791, 182 S.E.2d 676 (1971); *Brogdon v. State*, 136 Ga. App. 121, 220 S.E.2d 471 (1975); *Taylor v. State*, 136 Ga. App. 317, 221 S.E.2d 224 (1975); *Ware v. State*, 137 Ga. App. 673, 224 S.E.2d 873 (1976); *Robinson v. State*, 139 Ga. App. 480, 228 S.E.2d 615 (1976); *Alexander v. State*, 141 Ga. App. 16, 232 S.E.2d 364 (1977); *Palmer v. State*, 144 Ga. App. 480, 241 S.E.2d 597 (1978); *Harper v. State*, 146 Ga. App. 337, 246 S.E.2d 391 (1978); *Kilgore v. State*, 155 Ga. App. 739, 272 S.E.2d 505 (1980); *McElroy v. State*, 247 Ga. 355, 276 S.E.2d 38 (1981); *Wood v. Georgia*, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); *State v. Brinson*, 248 Ga. 380, 283 S.E.2d 463 (1981); *Garland v. State*, 160 Ga. App. 97, 286 S.E.2d 330 (1981); *Brewer v. State*, 162 Ga. App. 228, 291 S.E.2d 87 (1982); *Brooks v. State*, 162 Ga. App. 485, 292 S.E.2d 89 (1982); *Shaw v. State*, 164 Ga. App. 208, 296 S.E.2d 765 (1982); *Smith v. State*, 164 Ga. App. 384, 297 S.E.2d 738 (1982); *Beasley v. State*, 165 Ga. App. 160, 299 S.E.2d 886 (1983); *Strickland v. State*, 165 Ga. App. 197, 300 S.E.2d 537 (1983); *Moore v. Kemp*, 809 F.2d 702 (11th Cir. 1987).

## Probation Revocation Procedure

### 1. In General

**Revocation of probation based upon unprosecuted crime.** — Revocation of probation based at least in part upon alleged commission of a crime for which a party has

**Probation Revocation Procedure (Cont'd)****1. In General (Cont'd)**

not yet stood trial and been found guilty does not contravene principles of due process and fundamental fairness. *King v. State*, 154 Ga. App. 549, 269 S.E.2d 55 (1980).

**Revocation by different court.** — Probation may be revoked by a court of equivalent original criminal jurisdiction when the probationer's county of supervision and residence is different from the county of original conviction. *Biddy v. State*, 132 Ga. App. 264, 208 S.E.2d 22 (1974).

**Revocation based on felony.** — Where an act on which revocation of probation is based is a felony, it is not erroneous for the hearing judge to base revocation on that accusation, before the accused shall have first been tried and found guilty of the criminal charge. *Evans v. State*, 153 Ga. App. 764, 266 S.E.2d 545 (1980).

**Question as to excessiveness of sentence.** — Any question as to the excessiveness of a sentence which is otherwise legal should be addressed to the sentence review panel. *Strickland v. State*, 158 Ga. App. 340, 280 S.E.2d 168 (1981).

**Findings where record sufficient.** — Where the record from which basis for revocation can be ascertained is sufficient, it is not necessary for the trier of fact to commit his findings to a separate piece of paper. *Hayes v. State*, 168 Ga. App. 94, 308 S.E.2d 227 (1983).

**Separate hearing after grounds for revocation discovered.** — Court need not hold separate dispositional or sentencing hearing after finding grounds for revocation of probation. *Hayes v. State*, 157 Ga. App. 659, 278 S.E.2d 424 (1981).

**Persons empowered to make warrantless arrest of probation violators.** — The power to make a warrantless arrest of a known probation violator is not limited to the probation supervisor, but also includes a law enforcement officer with general arrest powers who has trustworthy information as to the probation violation. *Battle v. State*, 254 Ga. 666, 333 S.E.2d 599 (1985).

**2. Necessity for Prescribed Rules and Regulations**

**Purpose for showing rules and regulations prescribed.** — Probated sentences must

show the rules and regulations prescribed so that a violation of such rules and regulations will revoke the parole. *Simmons v. State*, 96 Ga. App. 718, 101 S.E.2d 111 (1957).

**Ambiguous sentence construed in favor of defendant.** — Hence, the trial court erred in revoking purported probation sentence since construed as a whole, the sentence was an alternative one and the defendant was to be discharged upon payment of the fines and costs. *Favors v. State*, 95 Ga. App. 318, 97 S.E.2d 613 (1957).

**Violations considered by court at probated sentence revocation hearing.** — Since the court cannot revoke a probated sentence unless that sentence has conditions sufficiently definite to be enforceable, and unless those conditions have not been complied with, and since the defendant is entitled to notice and an opportunity to be heard on the charge which is brought against him, only those alleged violations which are terms of the original sentence, and notice of the violation of which has been given the probationer, may be considered by the court on the hearing to revoke the probated sentence. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

**Revocation must be based on ground stated in petition.** — Where the trial court erroneously ruled that "theft by disposing" is a lesser included offense of theft by taking, revocation of defendant's probation could not stand because the revocation was not made on the ground stated in the petition. *Sosbee v. State*, 155 Ga. App. 196, 270 S.E.2d 367 (1980).

**3. Constitutional Requirements****A. In General**

**Probation as privilege.** — Probation is granted as a privilege, and not as a matter of right; and revocation of probation is punishment for the crime for which the defendant was convicted in the first instance. *Scott v. State*, 131 Ga. App. 504, 206 S.E.2d 137 (1974); *Heard v. State*, 154 Ga. App. 420, 268 S.E.2d 757 (1980).

**Applicability of double jeopardy clause.** — Because parole and probation revocation proceedings are not designed to punish a criminal defendant for violation of a criminal law and, because the purpose of parole and probation revocation proceedings is to



determine whether a parolee or probationer has violated the conditions of his parole or probation, such proceedings are fundamentally distinguishable from juvenile proceedings, the latter being indistinguishable from a criminal prosecution, and, thus, the double jeopardy clause of U.S. Const., Amend. 5 does not apply to parole and probation revocation proceedings. *United States v. Whitney*, 649 F.2d 296 (5th Cir. 1981).

**Revocation based on failure to pay restitution.** — Revocation of probation, premised upon failure to timely pay court ordered restitution, does not violate due process and equal protection. *Wilson v. State*, 155 Ga. App. 825, 273 S.E.2d 210 (1980).

**The minimum requirements of due process for parole revocation** are: a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. *Reed v. State*, 151 Ga. App. 224, 259 S.E.2d 209 (1979).

Although this section does not require it, "a written statement by the fact finders as to the evidence relied on and reasons for revoking probation" has been established as a minimum due process requirement in assuring the constitutional rights of an individual who will be condemned to suffer grievous loss by restraint of liberty. *Moore v. State*, 151 Ga. App. 791, 261 S.E.2d 730 (1979).

**Contents of revocation order.** — The order revoking probation must state evidence relied upon and reasons for revocation. *Rey v. State*, 156 Ga. App. 474, 274 S.E.2d 822 (1980).

**Use of uncorroborated accomplice testimony in hearing.** — Where uncorroborated accomplice testimony is shown inherently to lack credit, or is sufficiently controverted, abuse of discretion in admitting it in hearing may become manifest. *Christy v. State*, 134 Ga. App. 504, 215 S.E.2d 267 (1975).

## B. Notice

**Notice and hearing required for revocation.** — In order to revoke the probationary features of a sentence the defendant must have notice and opportunity to be heard, the notice being sufficient to inform him not only of the time and place of the hearing and the fact that revocation is sought, but the grounds upon which it is based. *Horton*

*v. State*, 122 Ga. App. 106, 176 S.E.2d 287 (1970).

Where probation is sought to be revoked, the defendant is entitled to notice, which notice must be sufficient to inform him of the manner in which he has violated his parole and give him an opportunity to defend. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

Where a person is placed under a probation sentence, probation cannot be revoked without notice to the probationer and an opportunity to be heard on the question as to whether he violated its terms. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972).

Failure to afford probationer notice and a hearing would render a revocation order void for lack of due process of law. *Sellers v. State*, 107 Ga. App. 516, 130 S.E.2d 790 (1963); *Scott v. State*, 131 Ga. App. 504, 206 S.E.2d 137 (1974).

**Application of slight evidence rule.** — Where defendant received written notice of the claimed violation of probation, the disclosure of the evidence against him, an opportunity to be heard in person and to present witnesses and document evidence, the right to confront and cross-examine adverse witnesses, heard by a neutral and detached judicial officer, with a written statement by the fact finder as to the evidence relied on and reasons for revoking probation, application of the "slight evidence" rule did not deny the defendant due process and equal protection. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

## C. Hearing

**Time period between petition and hearing.** — Absent special circumstances, 30 days is a reasonable time period between petition and hearing, for the sake of both the state and the offender. *Anderson v. State*, 166 Ga. App. 521, 304 S.E.2d 747 (1983).

**Purpose of a probation revocation hearing** is to determine whether the conduct of the defendant during the probation period has conformed to the terms and conditions outlined in the order of probation. *Evans v. State*, 153 Ga. App. 764, 266 S.E.2d 545 (1980).

**Form of meeting.** — The hearing required need not meet the requisites of a jury trial; the proceedings may be informal or



**Probation Revocation Procedure (Cont'd)**  
**3. Constitutional Requirements (Cont'd)**  
**C. Hearing (Cont'd)**

summary. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972); *Wellons v. State*, 144 Ga. App. 218, 240 S.E.2d 768 (1977).

**Applicability of rules of evidence.** — The rules of evidence of normal criminal proceedings are not applicable to a hearing under this section and evidentiary matters are within the discretion of the trial judge. *Christy v. State*, 134 Ga. App. 504, 215 S.E.2d 267 (1975).

**Use of preliminary hearing to establish probable cause for revocation hearing.** — Failure of trial court to afford a preliminary hearing to establish probable cause to conduct a revocation of probation hearing followed by an evidentiary show cause hearing, rather than consolidating the procedure into one hearing does not violate due process. *Wilson v. State*, 152 Ga. App. 695, 263 S.E.2d 691 (1979), cert. denied, 449 U.S. 847, 101 S. Ct. 133, 66 L. Ed. 2d 57 (1980).

**Criminal nature of act violating probation.** — Fact that act alleged to be in violation of probation is of a criminal nature does not change character of revocation hearing. *Robinson v. State*, 134 Ga. App. 591, 269 S.E.2d 86 (1980).

A hearing of this character is not a trial on a criminal charge, but is a hearing to judicially determine whether the conduct of the defendant during the probation period has conformed to the course outlined in the order of probation. If the act which violated the probation should happen to be a criminal one, it does not thereby change the character of the hearing. *Sparks v. State*, 77 Ga. App. 22, 47 S.E.2d 678 (1948); *Johnson v. State*, 214 Ga. 818, 108 S.E.2d 313 (1959).

**Stages for offering defenses.** — The fact that certain defenses could also be advanced in a trial upon the merits of the offense does not in any way drain the legal effect of a failure to offer defenses at the dispositional hearing. *Wilson v. State*, 152 Ga. App. 695, 263 S.E.2d 691 (1979), cert. denied, 449 U.S. 847, 101 S. Ct. 133, 66 L. Ed. 2d 57 (1980).

**Accusation by indictment as opposed to violation of probationary conditions.** — The defendant is not in the position of one accused by indictment, even though the probationary condition alleged to have been

violated is the commission of a crime. *Jackson v. State*, 140 Ga. App. 659, 231 S.E.2d 554 (1976).

**Trial court's discretion to grant motion for psychiatric examination.** — Where no special plea of insanity is filed, the granting of a motion for a psychiatric examination is within the sound discretion of the trial court. This rule attaches in probation revocation hearings as well as in criminal proceedings. *Mann v. State*, 154 Ga. App. 677, 269 S.E.2d 863 (1980).

**Review where no hearing transcript exists.** — Where there is no transcript of hearing, an appellate court is bound to assume that trial judge's findings are supported by sufficient competent evidence. *Nalley v. State*, 147 Ga. App. 634, 249 S.E.2d 685 (1978).

### D. Right to Counsel

**Probation revocation hearing.** — There is no right to counsel at a probation revocation hearing. *Mercer v. Hopper*, 233 Ga. 620, 212 S.E.2d 799 (1975).

A defendant is not ordinarily entitled to appointed counsel for a probation revocation hearing. *Kemp v. Spradlin*, 250 Ga. 829, 301 S.E.2d 874 (1983).

**Indigent defendant.** — An indigent is not entitled to appointed counsel at his probation revocation hearing. *Nalley v. State*, 147 Ga. App. 634, 249 S.E.2d 685 (1978).

**Statute providing for benefit of counsel.** — A proceeding to revoke a probated sentence of one convicted of a criminal offense is not a criminal proceeding, and the failure of the court to supply him with counsel is not a denial of the right to counsel unless a statute provides for benefit of counsel at such a hearing. *Dutton v. Willis*, 223 Ga. 209, 154 S.E.2d 221 (1967).

**Circumstances requiring appointment of legal counsel.** — See *Kemp v. Spradlin*, 250 Ga. 829, 301 S.E.2d 874 (1983).

### E. Trial by Jury

**Constitutionality.** — This section is not unconstitutional as a violation of Ga. Const. 1983, Art. I, Sec. I, Para. XI because no provision is made for trial by jury upon the hearing to determine whether a parole shall be revoked. Probation is granted as a privilege, and not as a matter of right; and the revocation of the probation is punishment

for the crime for which the defendant was convicted in the first instance. *Johnson v. State*, 214 Ga. 818, 108 S.E.2d 313 (1959).

**Probationer not guaranteed trial by jury.** — A hearing on a revocation is not a trial on a criminal charge and the probationer has no right to a trial by jury. *Sellers v. State*, 107 Ga. App. 516, 130 S.E.2d 790 (1963); *Scott v. State*, 131 Ga. App. 504, 206 S.E.2d 137 (1974).

## F. Search and Seizures

**Probationer status as factor in determining reasonableness of search.** — A defendant's status as a probationer, however, is a factor to be considered in determining whether a search and seizure by a probation officer is unreasonable. *Austin v. State*, 148 Ga. App. 784, 252 S.E.2d 696 (1979).

**Basis for reasonable search by probation officer.** — Search by a probation officer is reasonable if it is actuated by the legitimate operation of the probation supervision process and the probation officer acts reasonably in performing those duties. *Austin v. State*, 148 Ga. App. 784, 252 S.E.2d 696 (1979).

**Search warrant based on information derived from informants.** — If an affiant shows ample facts to authorize the issuing magistrate to conclude that there is probable cause to believe that a crime of the nature set forth in the affidavits has been committed and that evidence of the crime would be produced by a search of the premises described in the affidavits, the fact that much of the affiant's information is derived from informants will not vitiate the warrant. *Causey v. State*, 148 Ga. App. 755, 252 S.E.2d 664 (1979).

**Effect of illegality of arrest on revocation.** — Assuming that the defendant's arrest on charges of violating his probation was illegal, this would not in and of itself constitute a bar to the subsequent revocation of his probation. *Hayes v. State*, 157 Ga. App. 659, 278 S.E.2d 424 (1981).

## G. Use of Habeas Corpus

**Correction of errors or irregularities committed at trial.** — Where no exception was taken to order revoking probation as provided by law, the petitioner may not seek review, by habeas corpus, of the judgment

revoking the probationary sentence imposed upon his wife, since habeas corpus cannot be used as a substitute for appeal or other remedial procedure, for the correction of errors or irregularities alleged to have been committed by a trial court. *Balkcom v. Parris*, 215 Ga. 123, 109 S.E.2d 48 (1959).

**Showing that judgment of revocation is void required.** — Allegations in petition for habeas corpus that order of revocation under attack was premature, in that the probationer was entitled to a jury trial on the question of whether or not she had committed the offense in violation of the terms of her probation, prior to said revocation, that three days' notice of the revocation hearing was not sufficient or adequate notice, that she had been acquitted by a jury, subsequent to the order of revocation, of said offense alleged to have constituted the probation violation, and that the evidence on the hearing was insufficient to sustain the exercise of the judge's discretion in revoking probation were insufficient to sustain the prisoner's discharge under the writ, in that such allegations failed to show the judgment of revocation to be void, which is requisite to such relief. *Balkcom v. Parris*, 215 Ga. 123, 109 S.E.2d 48 (1959).

## Quantum of Proof Needed

### 1. In General

**Quantum of evidence required construed.** — The quantum of evidence sufficient to justify trial court in revoking a probationary sentence is less than that necessary to sustain a conviction in the first instance. *Lankford v. State*, 112 Ga. App. 204, 144 S.E.2d 463 (1965); *Boston v. State*, 128 Ga. App. 576, 197 S.E.2d 504 (1973); *Christy v. State*, 134 Ga. App. 504, 215 S.E.2d 267 (1975); *Barlow v. State*, 140 Ga. App. 667, 231 S.E.2d 561 (1976); *Swain v. State*, 157 Ga. App. 868, 278 S.E.2d 743 (1981); *Keasler v. State*, 165 Ga. App. 561, 301 S.E.2d 915 (1983).

The revocation of probation can rest upon evidence less than is required for conviction. *Kemp v. Spradlin*, 250 Ga. 829, 301 S.E.2d 874 (1983).

The quality or quantity necessary for revocation is not that demanded for conviction of a crime. *Seldon v. State*, 166 Ga. App. 326, 304 S.E.2d 475 (1983).



**Quantum of Proof Needed (Cont'd)****1. In General (Cont'd)**

All that is required to revoke probation is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation. *Evans v. State*, 153 Ga. App. 764, 266 S.E.2d 545 (1980).

**2. Slight Evidence Test**

**Evidence for revocation.** — Only slight evidence is required to authorize revocation. *Christy v. State*, 134 Ga. App. 504, 215 S.E.2d 267 (1975); *Barlow v. State*, 140 Ga. App. 667, 231 S.E.2d 561 (1976); *Gilbert v. State*, 150 Ga. App. 339, 258 S.E.2d 27 (1979); *Wade v. State*, 152 Ga. App. 529, 263 S.E.2d 268 (1979); *Pickard v. State*, 152 Ga. App. 707, 263 S.E.2d 679 (1979); *Morris v. State*, 153 Ga. App. 415, 265 S.E.2d 337 (1980); *White v. State*, 153 Ga. App. 808, 266 S.E.2d 528 (1980); *Heard v. State*, 154 Ga. App. 420, 268 S.E.2d 757 (1980); *King v. State*, 154 Ga. App. 549, 269 S.E.2d 55 (1980); *Robinson v. State*, 154 Ga. App. 591, 269 S.E.2d 86 (1980); *Lynch v. State*, 158 Ga. App. 232, 279 S.E.2d 537 (1981); *Davis v. State*, 165 Ga. App. 709, 302 S.E.2d 610 (1983); *Seldon v. State*, 166 Ga. App. 326, 304 S.E.2d 475 (1983).

**Evidence for violation of probation.** — Only slight evidence is necessary to support a finding of a violation of probation. *Jones v. State*, 153 Ga. App. 411, 265 S.E.2d 334 (1980).

On probation revocation hearing, slight evidence will be sufficient to support judgment revoking the probationary feature of the sentence. *Hulett v. State*, 150 Ga. App. 367, 258 S.E.2d 48 (1979).

It is not necessary that evidence support the finding beyond a reasonable doubt or even by a preponderance of the evidence. Only "slight evidence" is required. *Scott v. State*, 131 Ga. App. 504, 206 S.E.2d 137 (1974).

There must be some evidence that the defendant violated terms of his probated sentence as charged in the notice given him of the revocation hearing. *Young v. State*, 153 Ga. App. 454, 265 S.E.2d 362 (1980).

In determining sufficiency of evidence in probation revocation hearing, trial judge is

not bound by same rules of evidence as is jury in passing on the guilt or innocence of accused in first instance, but has wide discretion and only slight evidence is required to authorize revocation. *Partee v. State*, 155 Ga. App. 662, 272 S.E.2d 528 (1980).

Only slight evidence is required which need only be sufficient to satisfy the trial judge in exercise of his sound discretion that defendant has violated the terms of his probation. *Raines v. State*, 130 Ga. App. 1, 202 S.E.2d 253 (1973).

Slight evidence will support a judgment of revocation since the trial court on such a hearing has a wide discretion in considering the evidence against the probationer. *Horton v. State*, 122 Ga. App. 106, 176 S.E.2d 287 (1970).

**Constitutionality of standard.** — Under the "slight" evidence test, the standard by which the sufficiency of the evidence is determined, is not violative of due process in that it is less than that necessary to sustain a conviction. *King v. State*, 154 Ga. App. 549, 269 S.E.2d 55 (1980).

**Manifest abuse of discretion must be shown for reversal.** — Where the trial judge finds slight evidence that the conditions of probation have been violated, he may through his discretionary power revoke the probation, and such action may not be overturned without a showing that there has been a manifest abuse of discretion. *Hayes v. State*, 157 Ga. App. 659, 278 S.E.2d 424 (1981).

Only slight evidence is required to authorize revocation of probation and where there is even slight evidence of misconduct the appellate court will not interfere with revocation unless there has been a manifest abuse of discretion. *Gamble v. State*, 157 Ga. App. 613, 278 S.E.2d 413 (1981); *Swain v. State*, 157 Ga. App. 868, 278 S.E.2d 743 (1981); *Tinsley v. State*, 159 Ga. App. 579, 284 S.E.2d 84 (1981).

**3. Showing of Some Evidence**

**Appeal of revocation.** — The quantum of evidence necessary to support a probation revocation on appeal is merely that there be some legal evidence to support the finding; where no such evidence exists the decision must be reversed. *Moore v. State*, 155 Ga. App. 299, 270 S.E.2d 713 (1980).

Although the trial court on a hearing for



the revocation of probation has a wide discretion, and although only slight evidence will support a judgment of revocation, some evidence is required. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

Evidence need not support finding beyond reasonable doubt or even by preponderance of evidence but there must be some evidence for judge to consider as the sole trier of fact. *Wellons v. State*, 144 Ga. App. 218, 240 S.E.2d 768 (1977).

While the trial court has a wide discretion in revoking a probated sentence, and while only slight evidence will support a judgment of revocation, some evidence that the defendant violated the terms of his probated sentence as charged in the notice given him of the revocation hearing is required. *Kendrick v. State*, 125 Ga. App. 326, 187 S.E.2d 580 (1972).

#### 4. Proof Need Not Sustain Criminal Conviction

**Proof required.** — Revocation of probation does not require proof sufficient to sustain a criminal conviction. *Bentley v. State*, 153 Ga. App. 408, 265 S.E.2d 292 (1980).

Revocation of probation does not require proof sufficient to sustain a criminal conviction beyond a reasonable doubt. *Sosbee v. State*, 155 Ga. App. 196, 270 S.E.2d 367 (1980).

It is not necessary that the evidence support the finding beyond a reasonable doubt or even by a preponderance of evidence. The judge is the trier of the facts and he has a very wide discretion. *Sellers v. State*, 107 Ga. App. 516, 130 S.E.2d 790 (1963).

The benefit and protection afforded under due process and equal protection clauses of Constitutions have not been violated in that the establishment of the defendant's guilt beyond reasonable doubt is not necessary to justify the revocation of a sentence of probation. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

**Effect of failure to revoke probation in subsequent criminal trial.** — Under subsection (c), the revocation or continuance of probation is still within the discretion of the trial court so long as a ruling to revoke is based on at least a preponderance of the evidence, as required by § 42-8-34.1(a). The exercise of discretion in declining to revoke

probation is not an adjudication of the allegations sufficient to constitute acquittal on the criminal charge forming the basis for the revocation proceeding. *State v. Jones*, 196 Ga. App. 896, 397 S.E.2d 209 (1990).

#### 5. Review of Revocation by Appeals Court

##### **Manifest abuse of discretion by trial court.**

— An appeals court will not interfere with a revocation unless there has been a manifest abuse of discretion on the part of the trial court. *Sellers v. State*, 107 Ga. App. 516, 130 S.E.2d 790 (1963); *Scott v. State*, 131 Ga. App. 504, 206 S.E.2d 137 (1974).

Where, after notice and hearing, the court revokes the probationary feature of a sentence, and there is some evidence which would indicate that there has been a violation thereof, the Court of Appeals will not interfere unless a manifest abuse of discretion on the part of the trial court appears. *Lankford v. State*, 112 Ga. App. 204, 144 S.E.2d 463 (1965).

Where there is any evidence supporting the offense charged as a violation of the probation, an appellate court will not interfere with a revocation unless there has been manifest abuse of discretion. *Barlow v. State*, 140 Ga. App. 667, 231 S.E.2d 561 (1976); *Clay v. State*, 143 Ga. App. 361, 238 S.E.2d 724 (1977); *Gilbert v. State*, 150 Ga. App. 339, 258 S.E.2d 27 (1979).

##### **Slight evidence of misconduct by trial court.**

— Even where there is slight evidence of misconduct, the appellate court will not interfere with revocation unless there has been manifest abuse of discretion. *Boston v. State*, 128 Ga. App. 576, 197 S.E.2d 504 (1973); *Christy v. State*, 134 Ga. App. 504, 215 S.E.2d 267 (1975); *Keasler v. State*, 165 Ga. App. 561, 301 S.E.2d 915 (1983).

On hearing to determine whether probation should be revoked, judge is sole trier of fact and where there is even slight evidence appellate court will not interfere with revocation unless there has been an abuse of discretion. *Rainwater v. State*, 127 Ga. App. 406, 193 S.E.2d 889 (1972).

##### **Evidence sufficient to support finding.**

— Slight evidence is sufficient to support a finding of probation revocation and evidence of criminal acts of which a defendant has been acquitted may be used to revoke his probation. *Kellam v. State*, 154 Ga. App. 561, 269 S.E.2d 493 (1980).

**Quantum of Proof Needed (Cont'd)**  
**5. Review of Revocation by Appeals Court (Cont'd)**

Because only slight evidence is required for revocation of probation any lack of specificity as to the date of the alleged violation in the rule nisi is harmless. *Wilson v. State*, 152 Ga. App. 695, 263 S.E.2d 691 (1979), cert. denied, 449 U.S. 847, 101 S. Ct. 133, 66 L. Ed. 2d 57 (1980).

**Evidence Sufficient for Revocation**

**Testimony of juvenile combined with arresting officer.** — Juvenile's testimony that defendant had broken window of jewelry store by throwing a rock, when added to the testimony of the police officer, who arrested them when he drove to the vicinity of the jewelry store after an alarm had gone off, that he did not see any other person in the area of the jewelry store except the defendant and the juvenile, under all the circumstances, authorized the court's revocation of probated sentence. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

**Testimony by policeman posing as drug buyer.** — Testimony by a police agent identifying the substance sold him by the defendant as marijuana is sufficient to authorize revocation of the defendant's probation. *Smith v. State*, 144 Ga. App. 631, 241 S.E.2d 499 (1978).

**Theft by deception.** — The evidentiary showing of theft by deception is sufficient to authorize the revocation of probation. *McKnight v. State*, 151 Ga. App. 121, 258 S.E.2d 918 (1979).

**Evidence Insufficient for Revocation**

**Charge in notice of arrest without introduction of supporting evidence.** — Where notice contained in the special order of arrest charged the defendant with manufacturing illicit whiskey, but no evidence at all was introduced, mere fact that defendant was operating a truck loaded with sugar, and that he refused to give the name of the purchaser or seller of the sugar and that he had no bill of lading or bill of sale for the same, which facts were perfectly consistent with the defendant's contention that he was doing some hauling, was not sufficient to authorize revocation of the probation order.

*George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

**Requirements as to contents of arrest order.** — Where notice contained in the order of arrest failed to charge the defendant with a violation of that provision of the probation order prohibiting him from leaving the state without permission, mere fact that he was stopped in Alabama was not a sufficient ground for revocation. *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

Probation may not be revoked where there is no evidence the defendant violated its terms in the manner charged in the notice, even though there may be evidence at the hearing that the defendant violated the terms of probation in some other manner as to which no notice was given. *Horton v. State*, 122 Ga. App. 106, 176 S.E.2d 287 (1970).

**Illegally seized evidence may not be used to revoke probation.** *Adams v. State*, 153 Ga. App. 41, 264 S.E.2d 532 (1980); *Owens v. State*, 153 Ga. App. 525, 265 S.E.2d 856 (1980).

**Applicability of criminal rules of procedure.** — A probation revocation hearing is not a criminal trial, and the same rules of procedure do not apply. *Austin v. State*, 148 Ga. App. 784, 252 S.E.2d 696 (1979).

**Computation of and Credit for Time Served**

**Crediting of probation toward imprisonment.** — When probationer is sentenced to serve time in penal institution for offense for which he has spent time on probation, that probation time must be credited to any sentence received, including cases involving first offender probation. *Stephens v. State*, 245 Ga. 835, 268 S.E.2d 330 (1980).

**Crediting of imprisonment time pending final disposition of revocation petition.** — Since trial court can order execution of sentence originally imposed, probationer is entitled to assert that periods of imprisonment prior to final disposition of his revocation petition must be counted toward that original sentence, and the order of revocation cannot result in the execution of a longer sentence than was originally imposed. *Dickey v. State*, 157 Ga. App. 13, 276 S.E.2d 75 (1981).

Since trial court cannot, under this sec-



tion and § 17-10-1, increase sentence originally passed, period of time probationer serves in jail prior to final disposition of his revocation proceeding is credited as time served on original sentence and thus limits the permissible parameters of the trial court's power to revoke. *Dickey v. State*, 157 Ga. App. 13, 276 S.E.2d 75 (1981).

Probationer imprisoned and awaiting final determination of whether he violated probation and what part of his original sentence should be executed is not serving that part of his sentence which is subsequently ordered executed when violation is found. During this period, the probationer is continuing to serve the probated part of his sentence prior to final disposition of the revocation petition. Such periods do not suspend the running of the original sentence received and the probationer is entitled to assert that those periods pending a determination of probation revocation are, in effect, served under probation and shall be considered as time served and shall be deducted from and considered a part of the time he was originally sentenced to serve. *Dickey v. State*, 157 Ga. App. 13, 276 S.E.2d 75 (1981).

**No credit for time served awaiting hearing.** — Time served by probationers incarcerated while awaiting a probation revocation hearing will not be credited toward any sentence imposed upon the probationers at such hearing. *Penney v. State*, 157 Ga. App. 737, 278 S.E.2d 460 (1981).

**Service of suspended sentence cannot exceed maximum confinement sentence.** — Once service of suspended sentence begins, either by incarceration or probation, it cannot exceed maximum sentence of confinement which could have been imposed. *Turnipseed v. State*, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

**Increase of original sentence prohibited.** — While under § 42-8-34 the trial court does have jurisdiction to change or modify the terms of the original sentence, it cannot, under this section and § 17-10-1, increase the sentence originally passed. *Turnipseed v. State*, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

**The revoking court may not increase the original sentence.** Thus the language "modify or change" in § 42-8-34 is limited by this section. *England v. Newton*, 238 Ga. 534, 233 S.E.2d 787 (1977).

Where, after the original suspended sentence in a bastardy proceeding was entered in 1968, the court held a hearing in 1974 and ordered child support payments to include medical bills, and certain arrearage caught up as conditions of probation, and a second post-sentence hearing was held in 1978, at a time when the defendant was not in arrears under either of the prior orders, the purpose of the hearing being for reconsideration of the terms of defendant's suspended sentence, after which the defendant's weekly payments were increased from \$12.50 to \$25.00, the effect was to increase the terms of the sentence originally passed and as such it was illegal. *Turnipseed v. State*, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

### Decisions Under Prior Law

#### 1. Decisions Under Code 1933, § 27-2702

**Deduction of probation served from subsequent imprisonment.** — One serving sentence on probation is fulfilling sentence as effectually as if confined in jail or on chain gang, and accordingly, if after a hearing the order granting such probation is revoked, the time served by the defendant before the revocation must be counted in his favor and deducted from the period of service imposed. *Roper v. Mallard*, 193 Ga. 684, 19 S.E.2d 525 (1942).

**Discretion of judge to suspend or probate sentence.** — A judge imposing sentence is granted power to suspend or probate the sentence under such rules and regulations as he thinks proper. *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951).

The judge has the right and authority to revoke the suspension or probation, after notice and a hearing, when the defendant violates any of the rules and regulations prescribed by the court. *Simmons v. State*, 96 Ga. App. 718, 101 S.E.2d 111 (1957).

**Notice and hearing required for revocation.** — The judge has the right and authority to revoke suspension or probation, after notice and a hearing, when the defendant violates any of the rules and regulations prescribed by the court. *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951).

Where a probation sentence is given, the trial judge is without authority to reserve the right to revoke the sentence without notice



**Decisions Under Prior Law (Cont'd).****1. Decisions Under Code 1933,****§ 27-2702 (Cont'd)**

or hearing. *Balkcom v. Gunn*, 206 Ga. 167, 56 S.E.2d 482 (1949).

**Violation of prescribed rules required for incarceration.** — Where no rules or regulations are prescribed, and no violation of a prescribed rule or regulation is alleged, the court is without authority to order the defendant incarcerated upon the theory that he has violated the terms and conditions of a probation sentence. *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951); *Simmons v. State*, 96 Ga. App. 718, 101 S.E.2d 111 (1957).

**2. Decisions Under Code 1933, § 27-2705**

**Right to hearing.** — The probationer has right to notice and hearing upon question of revocation, and an order of revocation without a hearing is void. *Roberts v. Lowry*, 160 Ga. 494, 128 S.E. 746 (1925).

**Requirement of and meaning of "due examination."** — It was general practice in Georgia for a warrant to be issued by a court on a written petition calling to the court's attention the alleged delinquency of a probationer, but the only requirement was that the defendant receive "due examination," which means that he be given notice and an opportunity to be heard, and there being no requirement that the proceeding be initiated by written petition of the solicitor general (now district attorney), technical defects in such a petition when filed would not vitiate the warrant issued by the court or subsequent proceedings thereon, provided the requirements of notice and opportunity to be heard are complied with. *Jackson v. State*, 91 Ga. App. 291, 85 S.E.2d 444 (1954), overruled on other grounds, *Jackson v. Jones*, 254 Ga. 127, 327 S.E.2d 206 (1985).

**Effect of deprivation of liberty without giving notice and hearing.** — To deprive a defendant of his liberty upon the theory that he has violated any of the rules and regulations prescribed in a suspended or probated sentence without giving him notice and opportunity to be heard upon the question of whether or not he has violated such rules and regulations, would violate one of the fundamental tenets that a person shall not be deprived of his liberty without due process of law, which includes notice and an

opportunity to be heard. *Lester v. Foster*, 207 Ga. 596, 63 S.E.2d 402 (1951).

**Review of revocation by appeals court. —**

Where, after due examination, the court revokes its order to the probationer to serve the remainder of his sentence outside the confines of the chain gang, jail, or other place of detention, Court of Appeals will not interfere unless a manifest abuse of discretion on the part of the lower court appears. *Brown v. State*, 71 Ga. App. 303, 30 S.E.2d 783 (1944).

The Court of Appeals will not interfere unless a manifest abuse of discretion appears. *Waters v. State*, 80 Ga. App. 104, 55 S.E.2d 677 (1949); *Bryant v. State*, 89 Ga. App. 891, 81 S.E.2d 556 (1954).

**Discretion of judge.** — The judge is the trier of the facts in a case for the revocation of probation and has very wide discretion and unless a manifest abuse of such discretion on the part of the lower court appears, the appellate court will not interfere. *Alewine v. State*, 79 Ga. App. 779, 54 S.E.2d 507 (1949).

The discretion of the judge in revoking probation will not be interfered with unless grossly abused. *Olsen v. State*, 21 Ga. App. 795, 95 S.E. 269 (1918); *Towns v. State*, 25 Ga. App. 419, 103 S.E. 724 (1920).

**Leaving jurisdiction of court is ground for revocation.** See *Shamblin v. Penn*, 148 Ga. 592, 97 S.E. 520 (1918).

**Quantum of evidence needed to revoke probation.** — The degree of evidence necessary to convict in a criminal case being that which convinces the jury of the guilt of the defendant beyond a reasonable doubt, and the degree necessary to support the revocation of a probation sentence being only some evidence that the defendant has violated the conditions of the probation, which satisfies the trial court hearing the same in the exercise of a very wide discretion — it is not necessary to show that the defendant has been convicted of the act constituting the condition of the probation; the sole issue before the trial court is that of whether or not the defendant has committed the act. *Bryant v. State*, 89 Ga. App. 891, 81 S.E.2d 556 (1954).

**Standard of certainty for establishing violation of conditions.** — Violation of the conditions of probation must be established with reasonable certainty so as to satisfy the

conscience of the court of the truth of the violation. It does not have to be established beyond a reasonable doubt. In such a hearing if the evidence inclines a reasonable and impartial mind to the belief that the defendant violated the terms of his probation, it is sufficient. *Sparks v. State*, 77 Ga. App. 22, 47 S.E.2d 678 (1948).

**Violation of probation condition determinative for revocation.** — It is not the record of conviction, but fact of guilt of violation of a condition of probation, which determines whether probation should be revoked, and in determining this question the trial judge is not bound by the same rules of evidence as a jury in passing upon the guilt or innocence of the accused in the first instance. It is not necessary that the evidence support the finding beyond a reasonable doubt or even by a preponderance of the evidence; the judge is the trier of the facts, and he has a very wide discretion. *Bryant v. State*, 89 Ga. App. 891, 81 S.E.2d 556 (1954).

**Judge conducting proceeding himself.** — It is not improper for the trial judge to issue an order or warrant for the arrest of the probationer and to conduct the proceeding himself. *Waters v. State*, 80 Ga. App. 104, 55 S.E.2d 677 (1949).

**When presumption of proper notice and opportunity to be heard invoked.** — Where a probationer is arrested on an order of the trial court directing that he be placed in custody until a given date and then brought before the court for examination to determine the issue of whether or not his probation shall be revoked, and such probationer is brought before the court under arrest at the time and place specified, and counsel for the probationer also appears and represents him at the hearing, it will be presumed that he had proper notice and ample opportunity to be heard, it not appearing that counsel made any motion for a continuance to allow additional time to prepare the defense. *Waters v. State*, 80 Ga. App. 104, 55 S.E.2d 677 (1949).

**Quantum of evidence necessary for revocation.** — Under the provisions of Code 1933, § 27-2705 (now this section), the examination of the defendant to determine whether he has violated the conditions of his probation is conducted by the court without a jury, and the quantum of evidence necessary to convince the court that a criminal act

authorizing revocation has been committed is different from that on a trial of the defendant for such offense under an indictment charging him therewith. *Price v. State*, 91 Ga. App. 381, 85 S.E.2d 627 (1955).

**Probationer entitled to fair treatment.** — While probation is matter of grace, probationer is entitled to fair treatment and not to be made the victim of baseless impression or caprice. *Sparks v. State*, 77 Ga. App. 22, 47 S.E.2d 678 (1948).

**Effect on defendant's sentence of not prescribing rules and regulations.** — To deprive a defendant of his liberty upon the theory that he has violated rules and regulations prescribed in his sentence, when no rules, regulations, conditions, limitations, or restrictions were imposed by such sentence, would deprive the defendant of "due process of law." *Cross v. Huff*, 208 Ga. 392, 67 S.E.2d 124 (1951).

**Sentence held to be too vague.** — Where sentence on charge of abandonment did not specify whether payments required were in the nature of fine or as payments for the support of the defendant's child or children, and failed to specify where or to whom the payments were to be made, this provision of the sentence was too vague and indefinite to be enforceable, and a revocation of the probation sentence solely on the ground that the defendant did not make the payments specified was without authority of law. *Guest v. State*, 87 Ga. App. 184, 73 S.E.2d 218 (1952).

**Ambiguous sentence construed in favor of defendant.** — A sentence which is, in its entirety, ambiguous and doubtful should be given that construction which favors the liberty of the individual; sentences in criminal cases to be strictly construed, and, on a hearing of an issue made by motion to revoke a probation sentence on the theory that certain rules and regulations prescribed therein have been violated, it must appear that the rules were in fact prescribed with definiteness and certainty in the sentence, and that there has been an infraction thereof, since to deprive the prisoner of his liberty otherwise would be a violation of due process. *Guest v. State*, 87 Ga. App. 184, 73 S.E.2d 218 (1952).

**Refusal to discharge upon habeas corpus not error.** — Where the original probation was void, it was not error to refuse to dis-



**Decisions Under Prior Law (Cont'd)****2. Decisions Under Code 1933,****§ 27-2705 (Cont'd)**

charge defendant upon writ of habeas corpus. *Shamblin v. Penn*, 148 Ga. 592, 97 S.E. 520 (1918); *Roberts v. Lowry*, 160 Ga. 494, 128 S.E. 746 (1925).

**Revocation order not final judgment. —**

The order revoking probationer's parole is not such a final judgment as is subject to review under Art. 2, Ch. 6, T. 5. *Antonopoulos v. State*, 151 Ga. 466, 107 S.E. 156 (1921); *Troup v. State*, 27 Ga. App. 636, 109 S.E. 681 (1921); *Jackson v. State*, 27 Ga. App. 648, 110 S.E. 423 (1921).

**OPINIONS OF THE ATTORNEY GENERAL**

**Affidavit required for arrest of probation violator. —** Valid warrant for arrest of probation violator must be accompanied by affidavit, and to be valid, the affidavit must be sworn to under oath and signed by affiant. 1981 Op. Att'y Gen. No. 81-99.

**Arrest of probationer without warrant. —** If a probation violator is arrested without a warrant, it would be incumbent upon the probation supervisor or other arresting officer to procure a warrant within the 48-hour period of time specified in § 17-4-62. 1988 Op. Att'y Gen. No. U88-14.

**Personal knowledge of affiant. —** Affiant need not have personal knowledge of information to which he swears when executing affidavit for arrest of probation violator. 1981 Op. Att'y Gen. No. 81-99.

**Where hearing held. —** Probation violator may be returned to sentencing court for hearing or he may have hearing in court of equivalent original criminal jurisdiction within county wherein probationer resides for purposes of supervision upon the giving of ten days' written notice to the sentencing court prior to the hearing on the merits. 1965-66 Op. Att'y Gen. No. 66-257.

**Fingerprinting of offenders. —** This offense is one for which those charged with a violation are to be fingerprinted. 1996 Op. Att'y Gen. No. 96-17.

**Revocation only by circuit imposing probation. —** Only the circuit imposing first offender probation may revoke that period of probation, even though supervision has been transferred to another judicial circuit. 1980 Op. Att'y Gen. No. 80-79.

**Violation committed subsequent to imposition of sentence. —** A probated sentence may be revoked if the sentence being revoked is in effect and being served at the time the order of revocation is made, even if the act constituting the violation was committed prior to the commencement of ser-

vice of the probated sentence; provided that the violation was committed subsequent to the imposition of sentence. 1974 Op. Att'y Gen. No. U74-107.

**Acceptance into state penal system. —** Once a court revokes probation and orders serving of sentence, the clerk sends notice to Board of Offender Rehabilitation (Corrections) and the state has an obligation to accept such persons into state penal system. 1982 Op. Att'y Gen. No. 82-33.

**Collection of funds for suspended sentences. —** Upon proper court order, the probation officers would be authorized to collect funds made payable in connection with suspended sentences. 1963-65 Op. Att'y Gen. p. 4.

**Issuance of warrant against probationer. —** Issuance of warrant against person serving probated sentence does not stop running of time of the probated sentence; if probated sentence is revoked pursuant to the provisions for a hearing and judicial determination as set forth by this section, then the length of time to be served on the original sentence shall be time of sentence remaining after deduction is made for time which the probationer served under probation. 1967 Op. Att'y Gen. No. 67-391.

**Crediting probation time toward imprisonment. —** Upon revocation of probated sentence, offender cannot be returned to confinement for period of time in excess of original probationary period. 1974 Op. Att'y Gen. No. U74-107.

**Crediting time served outside prison upon revocation. —** This section does not mean that in every case where probation is revoked, without more, the prisoner is not to receive credit for the time served outside the confines of the jail or prison, but it was the intention of the General Assembly that the judge revoking probation have the power to either give or deny such credit; it, therefore, is necessary to refer to the language of the



order revoking probation. 1957 Op. Att'y Gen. p. 201.

**Crediting confinement period after revocation.** — After revocation of probated sentence, in determining remaining balance of the sentence, defendant is credited with time on probation; however, to prevent the defendant from receiving double credit for this time, jail time credit should not be awarded toward the period of confinement ordered after revocation of a probated sentence. 1973 Op. Att'y Gen. No. 73-1.

**Ambiguous orders granting credit to be construed in prisoner's favor.** — Where order revoking probation is ambiguous with respect to whether prisoner should or should not receive credit for time served outside prison, it would be necessary to give credit for such time, under the rulings that an order of probation, and the order revoking same, is a part of the sentence and in cases of ambiguity, a sentence is to be con-

strued so as to give the benefit of the doubt to the accused. 1957 Op. Att'y Gen. p. 201.

**Credit for time after revocation.** — For discussion of the effect of *Stephens v. State*, 245 Ga. 835, 268 S.E.2d 330 (1980), which decided whether, upon revocation of probation entered under the terms of the First Offender Act, § 42-8-60, a criminal defendant was entitled to credit for time already spent of first offender probation, see 1983 Op. Att'y Gen. No. 83-6.

**Running of sentence imposed subsequent to probation.** — A sentence imposed subsequent to revocation of first offender probation should run from the date that sentence is imposed. 1976 Op. Att'y Gen. No. 76-16.

**Running of probation preceded by imprisonment.** — Probated sentence preceded by term of imprisonment begins upon offender's fulfillment, including parole supervision, of the imprisonment obligation. 1974 Op. Att'y Gen. No. U74-107.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1549-1568.

**ALR.** — Right to assistance of counsel at proceedings to revoke probation, 44 ALR3d 306.

Propriety, in imposing sentence for original offense after revocation of probation, of considering acts because of which probation was revoked, 65 ALR3d 1100.

Acquittal in criminal proceeding as precluding revocation of probation on same charge, 76 ALR3d 564.

Propriety of revocation of probation for subsequent criminal conviction which is subject to appeal, 76 ALR3d 588.

Admissibility, in state probation revocation proceedings, of evidence obtained through illegal search and seizure, 77 ALR3d 636.

Admissibility, in state probation revocation proceedings, of incriminating statement obtained in violation of Miranda rule, 77 ALR3d 669.

Right of defendant sentenced after revocation of probation to credit for jail time served as a condition of probation, 99 ALR3d 781.

Admissibility of hearsay evidence in probation revocation hearings, 11 ALR4th 999.

Power of court, after expiration of probation term, to revoke or modify probation for violations committed during the probation term, 13 ALR4th 1240.

Power of court to revoke probation for acts committed after imposition of sentence but prior to commencement of probation term, 22 ALR4th 755.

Defendant's right to credit for time spent in halfway house, rehabilitation center, or other restrictive environment as condition of probation, 24 ALR4th 789.

Probation revocation: insanity as defense, 56 ALR4th 1178.

Determination that state failed to prove charges relied upon for revocation of probation as barring subsequent criminal action based on same underlying charges, 2 ALR5th 262.

#### 42-8-39. Suspension of sentence does not place defendant on probation.

In all criminal cases in which the defendant is found guilty or in which a plea of guilty or of *nolo contendere* is entered and in which the trial judge

after imposing sentence further provides that the execution of the sentence shall be suspended, such provision shall not have the effect of placing the defendant on probation as provided in this article. (Ga. L. 1956, p. 27, § 13; Ga. L. 1960, p. 1148, § 2; Ga. L. 1965, p. 413, § 4.)

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**Comparison to other sections.** — This section deals with the effect of suspended sentences while §§ 17-10-1 and 17-10-4 deal with authority to impose them. *Cross v. State*, 128 Ga. App. 774, 197 S.E.2d 853 (1973).

**Authorized conditions.** — A condition which would be authorized in the case of a probated sentence would be authorized in the case of a suspended sentence. *Falkenhainer v. State*, 122 Ga. App. 478, 177 S.E.2d 380 (1970).

**Effect of amendment.** — This section was amended to specify that suspended sentences not come under this article, but it did not provide any change allowing the court to suspend sentences. *Cross v. State*, 128 Ga. App. 774, 197 S.E.2d 853 (1973).

**Suspension upon condition did not amount to probation.** — Suspension of a convicted drunk driver's sentence upon condition that he not drive for 120 days did not have the effect of placing him on probation, where his driver's license was automatically suspended for 120 days. *Williams v. State*, 191 Ga. App. 217, 381 S.E.2d 399 (1989).

**Distinguishing length of service for suspended and probated sentences.** — A court

may, at the time of sentencing, specify the amount to be paid by the parent for the support of the minor child and may suspend the service of the sentence pending the minority of the child. When the child reaches majority, the sentence of course is at an end. However, service of any sentence so suspended in abandonment cases may be ordered at any time before the child reaches age of 21. However, where a sentence is merely probated, the probationary feature of the sentence ends when the elapsed time equals the maximum sentence of confinement which could have been imposed. *Entrekin v. State*, 147 Ga. App. 724, 250 S.E.2d 177 (1978).

**Abuse of discretion by court.** — A trial court abuses its discretion when it places a case on the dead docket over defendant's objection. *Newman v. State*, 121 Ga. App. 692, 175 S.E.2d 144 (1970).

**Cited in** *Todd v. State*, 107 Ga. App. 771, 131 S.E.2d 201 (1963); *Rowland v. State*, 120 Ga. App. 248, 170 S.E.2d 58 (1969); *Falkenhainer v. State*, 122 Ga. App. 478, 177 S.E.2d 380 (1970); *Jones v. State*, 154 Ga. App. 581, 269 S.E.2d 77 (1980).

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**Running of suspended sentence conditioned on payment of fine.** — Suspended sentence conditioned on payment of fine does not begin to run if fine is not paid until state or defendant initiates action to have suspension revoked. 1981 Op. Att'y Gen. No. U81-42.

**Effect of suspension of part of sentence.** — In the imposition of a sentence, if the trial court suspends service of part of sentence, the provision for suspension shall not have the effect of placing the defendant on probation; thus, once a probated sentence is revoked and said probationer has been sentenced to a definite period of years of imprisonment and the remainder of his sentence has been suspended, this sentence

does not have the effect of placing the defendant on probation and, therefore, such sentence cannot be revoked. 1968 Op. Att'y Gen. No. 68-165.

**Modification of original sentence upon probation.** — When a prisoner is placed on probation, the original sentence is subject to modification by the rendering court at any time during the period of probation; the judge imposing sentence is granted the power and authority to revoke suspension or probation when the defendant has violated any of the rules or regulations prescribed by the court. 1968 Op. Att'y Gen. No. 68-165.

**Remanding offender to prison upon suspension of sentence.** — The State Board of Pardons and Paroles cannot remand of-

fender to prison where sentence has been suspended by court. 1963-65 Op. Att'y Gen. p. 36.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1458, 1549-1568.

**ALR.** — What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon, 58 ALR3d 1156.

Pretrial diversion: statute or court rule authorizing suspension or dismissal of criminal prosecution on defendant's consent to noncriminal alternative, 4 ALR4th 147.

Appealability of order suspending imposition or execution of sentence, 51 ALR4th 939.

### 42-8-40. Confidentiality of papers; exemption from subpoena; declassification.

All reports, files, records, and papers of whatever kind relative to the state-wide probation system are declared to be confidential and shall be available only to the probation system officials and to the judge handling a particular case. They shall not be subject to process of subpoena. However, these records may be declassified by a majority vote of the board whenever the board deems it advisable. (Ga. L. 1956, p. 27, § 19; Ga. L. 1958, p. 15, § 11.)

**Cross references.** — Inspection of public records generally, § 50-18-70 et seq.

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**Applicability to presentence investigation reports.** — This section applies to presentence investigation reports. *Mills v. State*, 244 Ga. 186, 259 S.E.2d 445 (1979).

**Right to verbatim copy of presentence report.** — A defendant has no constitutional right to a verbatim copy of the presentence investigation report for use in sentence review process. Hence, this section is not unconstitutional on the ground it prohibits a defendant from obtaining access to the report. *Mills v. State*, 244 Ga. 186, 259 S.E.2d 445 (1979).

**Right to compulsory process.** — This section unconstitutionally limited a criminal defendant's constitutional right to compulsory process where it was applied to prevent the defendant obtaining a copy of the results of a drug test in order to put forth a defense in a criminal trial. *Dean v. State*, 267 Ga. 306, 477 S.E.2d 573 (1996).

**Revealing presentence report to counsel.** — If a presentence probation report contains any matter adverse to the defendant and likely to influence the decision to suspend or probate the sentence, it should be revealed to defense counsel by the trial judge in advance of the presentence hearing to give the accused an opportunity for explanation or rebuttal. *Benfield v. State*, 140 Ga. App. 727, 232 S.E.2d 89 (1976).

**Testimony relating to confidential records and petitions barred.** — Where records and petitions to revoke probation have been declared confidential and not subject to process of subpoena by statute, the trial court in probation revocation hearing does not err in refusing to admit testimony relating to them. *Penney v. State*, 157 Ga. App. 737, 278 S.E.2d 460 (1981).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1549-1568.

**ALR.** — Right of convicted defendant or prosecution to receive updated presentence report at sentencing proceedings, 22 ALR5th 660.

**42-8-41. Cooperation of state and local entities with probation officials.**

All state and local departments, agencies, boards, bureaus, commissions, and committees shall cooperate with the probation officials. (Ga. L. 1956, p. 27, § 17.)

**42-8-42. Provision of office space and clerical help by department and counties.**

The department may provide office space and clerical help wherever needed. The counties of this state shall cooperate in this respect and, wherever possible, shall furnish office space if needed. (Ga. L. 1956, p. 27, § 18.)

**42-8-43. Effect of article on existing county probation systems.**

Except as otherwise provided by law, any county probation system in existence on February 8, 1956, shall not be affected by the passage of this article, regardless of whether the law under which the system exists is specifically repealed by this article. The personnel of the system shall continue to be appointed and employed under the same procedure as used prior to February 8, 1956, and the system shall be financed under the same method as it was financed prior to February 8, 1956. However, the substantive provisions of this article relative to probation shall be followed, and to this end any probation officer of such system shall be deemed to be the same as a probation supervisor, with the probation supervisor assigned by the department serving in a liaison capacity between the county probation system and the department. (Ga. L. 1956, p. 27, § 15; Ga. L. 1972, p. 604, § 11.)

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**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code 1933, § 27-2703, prior to revision by Ga. L. 1956, p. 27, § 15 are included in the annotations for this Code section.

**Authority for appointment of probation officers.** — Where, in a petition for mandamus to compel the payment of salary of a probation officer, the petition enumerates

specified grand jury recommendations for the appointment of such officers, and sets forth in chronological order the appointments made by the judge in pursuance thereto, and where the appointment of the petitioner is shown to have been made at a time when the number of such officers authorized by the grand jury had not been filled by appointments of the judge, there

was authority for the appointment of the probation officers. *MacNeill v. Wertz*, 200 Ga. 429, 37 S.E.2d 362 (1946).

**Grand jury's intent must be clear and understandable.** — Where, by an Act of the legislature, an office is created to become effective and operative upon the recommendation of the grand jury, no particular form or language is required in the presentments so long as the intent of the grand jury's recommendation is clear and understandable. *MacNeill v. Wertz*, 200 Ga. 429, 37 S.E.2d 362 (1946).

**Creation of office of probation officer.** — Upon recommendation of grand jury, the office of probation officer became operative and legally existed, even though no one was appointed thereto, and the appointment of the official became mandatory upon the judge. *MacNeill v. Wertz*, 200 Ga. 429, 37 S.E.2d 362 (1946).

**Salary of probation officer.** — Where

properly appointed to office with a salary fixed, a probation officer is entitled to its salary, whether or not he performs the duties of the office. *MacNeill v. Wertz*, 200 Ga. 429, 37 S.E.2d 362 (1946).

**Vacancy in probation office.** — The fact that the office of probation officer is not being filled by anyone does not nullify the legal existence of the office. *MacNeill v. Wertz*, 200 Ga. 429, 37 S.E.2d 362 (1946).

**Assistant probation officers.** — Assistant probation officers appointed by judges of the superior court are answerable only to the court making the appointment, and serve at the pleasure of such court. Such persons are not county officers, nor are they county employees, as all county officers and employees have duties to perform that relate to powers delegated to the counties. *Civil Serv. Bd. v. MacNeill*, 201 Ga. 643, 40 S.E.2d 655 (1946).

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**Systems cannot be converted into private operations.** — Any remaining county probation systems cannot be converted into a

system operated by a private corporation without legislative authority. 1989 Op. Att'y Gen. No. U89-8.

#### 42-8-43.1. Participation in cost of county probation systems; merging of county systems into state system.

(a) This Code section shall apply to county probation systems of all counties of this state having a population of 400,000 or more according to the United States decennial census of 1980 or any future such census, any provision of Code Section 42-8-43 to the contrary notwithstanding. The department shall participate in the cost of the county probation systems subject to this Code section for fiscal years 1982-83 and 1983-84. The department shall compute the state cost per probationer on a state-wide basis for each of the aforesaid fiscal years pursuant to the formula used by the Office of Planning and Budget to determine the state cost for probation for budgetary purposes. For each of the aforesaid fiscal years, the department shall pay to the governing authority of each county maintaining a county probation system subject to this Code section the percentage shown below of the state-wide cost per probationer for each probationer being supervised under the respective county probation system as of the first day of each of said fiscal years:

- (1) For fiscal year 1982-83, 10 percent; and
- (2) For fiscal year 1983-84, 10-100 percent.

(b) The funds necessary to participate in the cost of county probation systems under subsection (a) of this Code section shall come from funds appropriated to the department for the purposes of providing state participation in the cost of county probation systems. The payments to counties provided for in subsection (a) of this Code section shall be made by, or pursuant to the order of, the department in single lump sum payment for each fiscal year, with the payment for fiscal year 1982-83 being made by May 1, 1983, and the one for fiscal year 1983-84 by May 1, 1984. As a condition necessary for a county to qualify for department participation in the cost of the county's probation system, the employees of such county probation systems shall be subject to the supervision, control, and direction of the department.

(c) Each county probation system subject to the provisions of this Code section shall become a part of the state-wide probation system provided for by this article effective on July 1, 1984, and shall be fully funded from state funds as a part of the state-wide probation system beginning with fiscal year 1984-85. The employees of said county probation systems, at their option, shall become employees of the department on the date said county systems become a part of the state-wide probation system and, on or after said date, said employees shall be subject to the salary schedules and other personnel policies of the department, except that the salaries of such employees shall not be reduced as a result of becoming employees of the department.

(d) When an employee of a county probation system of any county of this state having a population of 550,000 or more according to the United States decennial census of 1980 or any future such census becomes an employee of the department pursuant to subsection (c) of this Code section at the same or a greater salary, the change in employment shall not constitute involuntary separation from service or termination of employment within the meaning of any local retirement or pension system of which the employee was a member at the time of such change in employment, and the change in employment shall not entitle the employee to begin receiving any retirement or pension benefit whatsoever under any such local retirement or pension system. (Code 1981, § 42-8-43.1, enacted by Ga. L. 1982, p. 1605, § 1; Ga. L. 1983, p. 421, § 1.)

**Editor's notes.** — Ga. L. 1982, p. 1605, § 2 provided that if either a local Act or a general law of local application were adopted and became effective on or before April 1, 1983, expressing approval that a county probation system affected by this Code section become part of the state-wide probation system in accordance with this Code section, then this Code section would become effective on April 1, 1983, as to county probation systems affected by it. Ga. L. 1982, p. 5099, § 1 expressed such ap-

proval as to counties with a population of 550,000 or more, according to the United States decennial census of 1980 or any future such census, and declared that any county affected by it approves its county probation system becoming part of the state-wide probation system in accordance with this Code section. Ga. L. 1983, p. 3982, § 1, effective March 14, 1983, expressed such approval for the county probation system of DeKalb County.



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**Retirement by operation of law.** — Since the General Assembly provided that, upon takeover of a county probation system by the state system, the employees of the county system could at their option become employees of the state system performing the same

duties without a reduction in salary and could continue participation in their county pension plans, the employees were not retired by operation of law under their pension plans. *Barnett v. Fulton County*, 255 Ga. 419, 339 S.E.2d 236 (1986).

## OPINIONS OF THE ATTORNEY GENERAL

**Supervision of probationers.** — The Probation Division of the Department of Offender Rehabilitation (Corrections) is responsible for supervising persons who have received probated sentences from the Traffic Court of the City of Atlanta. 1984 Op. Att'y Gen. No. 84-41.

**Seniority of employees becoming state employees.** — A county employee who becomes a state employee pursuant to this section will have whatever seniority is authorized by the Rules and Regulations of the State Personnel Board, so long as the em-

ployee's salary is not reduced. 1984 Op. Att'y Gen. No. 84-38.

**Transfer of accrued personal leave by employees.** — No leave accrued by a county employee under a county personnel system can be transferred when the employee becomes a state employee since assumption of such leave by the state would be a gratuity prohibited by Ga. Const. 1983, Art. III, Sec. VI, Para. VI and would violate Ga. Const. 1983, Art. VII, Sec. IV, Para. X, which prohibits the assumption of any debt owed by the county. 1984 Op. Att'y Gen. No. 84-38.

#### 42-8-43.2. Payments by state to county probation systems; merger of county systems into state-wide system.

(a) This Code section shall apply to county probation systems, including state court adult probation systems, of each county having a population of more than 100,000 in any metropolitan statistical area having a population of not less than 200,000 nor more than 230,000 according to the United States decennial census of 1980 or any future such census, any provision of Code Section 42-8-43 to the contrary notwithstanding. The department shall participate in the cost of the county probation systems subject to this Code section for fiscal year 1987-88. The department shall compute the state cost per probationer on a state-wide basis for such fiscal year pursuant to the formula used by the Office of Planning and Budget to determine the state cost for probation for budgetary purposes. For said fiscal year, the department shall pay to the governing authority of each county maintaining a county probation system subject to this Code section 10 percent of the state-wide cost per probationer for each probationer being supervised under the respective county probation system as of the first day of said fiscal year. The funds necessary to participate in the cost of county probation systems under this subsection shall come from funds appropriated to the department for the purposes of providing state participation in the cost of county probation systems. The payments to counties provided for in this subsection shall be made by, or pursuant to the order of, the department in single lump sum payment for fiscal year 1987-88, with the payment being made by May 1, 1988. As a condition necessary for a county to qualify for

department participation in the cost of the county's probation system, the county shall cause to be made an independent audit of the financial affairs and transactions of all funds and activities of the county probation system and agree to be responsible for any discrepancies, obligations, debts, or liabilities of such county probation system which may exist prior to the department's participation in the cost of the county's probation system. As a further condition necessary for a county to qualify for department participation in the cost of the county's probation system, the employees of such county probation systems shall be subject to the supervision, control, and direction of the department.

(b) The county probation system of any such county shall become a part of the state-wide probation system provided for by this article effective July 1, 1988, and shall be fully funded from state funds as part of the state-wide probation system beginning with fiscal year 1988-89. The employees of such county probation system, at their option, shall become employees of the department on the date said county system becomes a part of the state-wide probation system and, on or after said date, said employees shall be subject to the salary schedules and other personnel policies of the department, except that the salaries of such employees shall not be reduced as a result of becoming employees of the department.

(c) When an employee of a county probation system becomes an employee of the department pursuant to subsection (b) of this Code section at the same or a greater salary, the change in employment shall not constitute involuntary separation from service or termination of employment within the meaning of any local retirement or pension system of which the employee was a member at the time of such change in employment, and the change in employment shall not entitle the employee to begin receiving any retirement or pension benefit whatsoever under any such local retirement or pension system.

(d) No leave time accrued by an employee of a county probation system shall be transferred when the employee becomes a state employee. Any leave time accrued by an employee of such county probation system shall be satisfied as a debt owed to the employee by the county. (Code 1981, § 42-8-43.2, enacted by Ga. L. 1987, p. 1319, § 1.)

**Editor's notes.** — Section 2 of Ga. L. 1987, Act shall not commence until fiscal year p. 1319, not codified by the General Assembly, 1987-1988. provided that state funding under that

### **42-8-43.3. Participation in cost of county probation systems in counties with population of 250,000 or more.**

(a) This Code section shall apply to county probation systems, including state court adult probation systems, of each county having a population of 250,000 or more according to the United States decennial census of 1980 or

any future such census, any provision of Code Section 42-8-43 to the contrary notwithstanding. The department shall participate in the cost of the county probation systems subject to this Code section for fiscal year 1988-89. For said fiscal year, the department shall pay to the governing authority of each county maintaining a county probation system subject to this Code section 10 percent of the annual county probation system budget as of the first day of said fiscal year. The funds necessary to participate in the cost of county probation systems under this subsection shall come from funds appropriated to the department for the purposes of providing state participation in the cost of county probation systems. The payments to counties provided for in this subsection shall be made by, or pursuant to the order of, the department in single lump sum payment for fiscal year 1988-89, with the payment being made by May 1, 1989. As a condition necessary for a county to qualify for department participation in the cost of the county's probation system, the county shall cause to be made an independent audit of the financial affairs and transactions of all funds and activities of the county probation system and agree to be responsible for any discrepancies, obligations, debts, or liabilities of such county probation system which may exist prior to the department's participation in the cost of the county's probation system. As a further condition necessary for a county to qualify for department participation in the cost of the county's probation system, the employees of such county probation systems shall be subject to the supervision, control, and direction of the department.

(b) The county probation system of any such county shall become a part of the state-wide probation system provided for by this article effective July 1, 1989, and shall be fully funded from state funds as part of the state-wide probation system beginning with fiscal year 1989-90. The employees of such county probation system, at their option, shall become employees of the department on the date said county system becomes a part of the state-wide probation system and, on or after said date, said employees shall be subject to the salary schedules and other personnel policies of the department, except that the salaries of such employees shall not be reduced as a result of becoming employees of the department.

(c) When an employee of a county probation system becomes an employee of the department pursuant to subsection (b) of this Code section at the same or a greater salary, the change in employment shall not constitute involuntary separation from service or termination of employment within the meaning of any local retirement or pension system of which the employee was a member at the time of such change in employment, and the change in employment shall not entitle the employee to begin receiving any retirement or pension benefit whatsoever under any such local retirement or pension system.

(d) No leave time accrued by an employee of a county probation system shall be transferred when the employee becomes a state employee. Any



leave time accrued by an employee of such county probation system shall be satisfied as a debt owed to the employee by the county. (Code 1981, § 42-8-43.3, enacted by Ga. L. 1988, p. 1951, § 1.)

**Editor's notes.** — Ga. L. 1988, p. 1951, § 2, not codified by the General Assembly, provides that this Code section becomes effective "only upon the appropriation of

the funds necessary to carry out the provisions of this Act by the General Assembly." Funds were appropriated in 1992 effective July 1, 1992.

#### 42-8-44. Construction of article.

This article shall be liberally construed so that its purposes may be achieved. (Ga. L. 1956, p. 27, § 20.)

### ARTICLE 3

#### PROBATION OF FIRST OFFENDERS

##### JUDICIAL DECISIONS

**Terms and conditions.** — A probation cannot be revoked for a violation of terms and conditions if there are no terms and conditions to the probation. *Helton v. State*, 166 Ga. App. 565, 305 S.E.2d 27 (1983).

**Carryover to subsequent probation.** — When a first offender probation is revoked, that probation, and its terms and conditions, is effectively eliminated, leaving nothing to be carried over to any subsequent probation. *Helton v. State*, 166 Ga. App. 565, 305 S.E.2d 27 (1983).

**Sentence admissible in murder trial.** — At the sentencing phase of a murder trial, the state offered in aggravation an indictment, the defendant's plea of guilty to the indict-

ment, and a sentence imposed under this article for the offenses of entering an automobile and theft by taking. This evidence was admissible, since evidence in aggravation is not limited to convictions, and reliable information tending to show a defendant's general bad character is admissible in aggravation. *Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989).

**Cited in** *Puckett v. State*, 163 Ga. App. 156, 293 S.E.2d 544 (1982); *J.C. Penney Co. v. Miller*, 182 Ga. App. 64, 354 S.E.2d 682 (1987).

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**Competency to serve on jury.** — A person who has been placed on probation pursuant to the First Offender Act does not become incompetent to serve on a grand or petit jury under § 15-12-60(b)(2) either before or after being discharged without court adjudication of guilt. 1990 Op. Att'y Gen. No. U90-6.

"Conviction" as defined in the Drug-Free Public Work Force Act of 1990, § 45-23-3, does not include treatment under the Georgia First Offender Act, nor does it include a conviction based on a plea of nolo contendere. 1990 Op. Att'y Gen. No. 90-16.

**42-8-60. Probation prior to adjudication of guilt; violation of probation; review of criminal record by judge.**

(a) Upon a verdict or plea of guilty or a plea of *nolo contendere*, but before an adjudication of guilt, in the case of a defendant who has not been previously convicted of a felony, the court may, without entering a judgment of guilt and with the consent of the defendant:

(1) Defer further proceeding and place the defendant on probation as provided by law; or

(2) Sentence the defendant to a term of confinement as provided by law.

(b) Upon violation by the defendant of the terms of probation, upon a conviction for another crime during the period of probation, or upon the court determining that the defendant is or was not eligible for sentencing under this article, the court may enter an adjudication of guilt and proceed as otherwise provided by law. No person may avail himself of this article on more than one occasion.

(c) The court shall not sentence a defendant under the provisions of this article and, if sentenced under the provisions of this article, shall not discharge the defendant upon completion of the sentence unless the court has reviewed the defendant's criminal record as such is on file with the Georgia Crime Information Center. (Ga. L. 1968, p. 324, § 1; Ga. L. 1982, p. 1807, § 1; Ga. L. 1985, p. 380, § 1; Ga. L. 1986, p. 218, § 1.)

**Cross references.** — Probation for first offenders of laws relating to possession of narcotic drugs, marijuana, etc., § 16-13-2. Punishment of misdemeanor first offenders between ages 16 and 18, § 17-10-3(c).

**Law reviews.** — For article on recidivism

and convictions based on *nolo contendere* pleas, see 13 Ga. L. Rev. 723 (1979). For article on the effect of *nolo contendere* plea on conviction, see 13 Ga. L. Rev. 723 (1979). For annual survey of criminal law and procedure, see 41 Mercer L. Rev. 115 (1989).

### JUDICIAL DECISIONS

**Provisions not applicable to DUI cases.** — The phrase "relating to probation of first offenders" in § 40-6-391(f) refers to the general title of this article, and does not purport to limit the prohibition of first offender treatment only to convictions for driving under the influence where probation is imposed. *Sims v. State*, 214 Ga. App. 443, 448 S.E.2d 77 (1994).

**Applicability of 1982 amendment.** — The 1982 amendment of this section is applicable only as to those defendants who committed their crime on or after November 1, 1982.

*Hahn v. State*, 166 Ga. App. 71, 303 S.E.2d 299 (1983).

The sentencing of a defendant first offender to a term of confinement under the provisions of this section, as amended effective November 1, 1982, for a crime committed on September 22, 1982, violated the ex post facto prohibition of the United States Constitution, where the law at the time of the commission of the crime contained no provision for a term of confinement. *Taylor v. State*, 181 Ga. App. 199, 351 S.E.2d 723 (1986).

**First-offender treatment by consent, prior to 1982 amendment.** — Although this section did not specifically provide for confinement as a condition of first-offender treatment before the 1982 amendment, where a condition of confinement was consented to by defendant at the time her first-offender treatment was imposed and where no adjudication of guilt was entered at that time, defendant's treatment was first-offender treatment even though ordered before the amendment, and trial court did not err in revoking the first-offender treatment, entering an adjudication of guilt, and imposing a sentence which was harsher than the terms originally imposed. *O'Ree v. State*, 172 Ga. App. 51, 322 S.E.2d 89 (1984).

**Jurisdiction of motion to withdraw guilty plea.** — Since judgments of conviction are not entered in cases proceeding under the First Offender Act unless the defendant violates the terms of probation, the sentencing court retains jurisdiction both for resentencing and to consider a motion to withdraw a guilty plea after the end of the term of court in which the plea was entered. *Tripp v. State*, 223 Ga. App. 73, 476 S.E.2d 844 (1996).

**First-offender status is discretionary.** — The trial court in rendering sentence is not required to give first-offender status merely because it is requested, even where no previous offense is shown; but according to the circumstances of the case, including the conduct of the individual defendant in the crime, the trial court may give in its discretion any sentence prescribed by law for the offense. *Welborn v. State*, 166 Ga. App. 214, 303 S.E.2d 755 (1983).

The trial court is not required to render a first offender status merely because it is requested even where no previous offense is shown; the trial court may give in its discretion any sentence prescribed by law for an offense, or probation. *Todd v. State*, 172 Ga. App. 231, 323 S.E.2d 6 (1984); *Head v. State*, 203 Ga. App. 730, 417 S.E.2d 398 (1992).

The trial court did not abuse its discretion by refusing to grant defendant first offender treatment because he committed a misdemeanor after the offense for which he sought first offender treatment. *Stinnett v. State*, 215 Ga. App. 224, 447 S.E.2d 165 (1994).

**Consideration of first offender status mandatory.** — A trial court's use of a mechanical

sentencing formula or policy whereby first offender status consideration was automatically refused, violated this section. *Jones v. State*, 208 Ga. App. 472, 431 S.E.2d 136 (1993).

**First-offender treatment may not be granted after defendant has been sentenced.** *Lewis v. State*, 217 Ga. App. 758, 458 S.E.2d 861 (1995).

**Preliminary probation sentences.** — General Assembly intended first offender probation sentence to be preliminary only, and, if completed without violation, permits the offender complete rehabilitation without the stigma of a felony conviction. *Stephens v. State*, 152 Ga. App. 591, 263 S.E.2d 477 (1979), rev'd on other grounds, 245 Ga. 835, 268 S.E.2d 330 (1980).

**Construed with § 40-5-75.** — Section 40-5-75, which mandates driver's license suspension for any person convicted of possession of a controlled substance or marijuana, does not apply to those defendants who are given first offender treatment under this section. *Priest v. State*, 261 Ga. 651, 409 S.E.2d 657 (1991).

A defendant who is given first offender treatment has not been "convicted" within the meaning of § 40-5-75 and mandatory driver's license suspension is not required. *Priest v. State*, 261 Ga. 651, 409 S.E.2d 657 (1991).

**Prior prosecution in which defendant given first offender treatment.** — As a result of the changes made in 1985 to this section, the use of a prior prosecution in which defendant was given first offender treatment and successfully completed the terms of his probated sentence "is not allowable by law" as provided in § 42-8-65. Accordingly, the portion of the case in which defendant was sentenced under subsection (a) of § 17-10-7 as a repeat offender had to be reversed and remanded for resentencing. *Queen v. State*, 182 Ga. App. 794, 357 S.E.2d 150 (1987) (holding Op. Att'y Gen. U81-32 incorrectly states present law).

**Expungement upon completion of probation** of the records of first offender treatment of criminal defendants runs contrary to the intent and the practical operation of the First Offender Act. *State v. C.S.B.*, 250 Ga. 261, 297 S.E.2d 260 (1982).

**Guilty plea not a "conviction."** — The entry of a guilty plea under this section is not



a "conviction" within the usual definition of that term. *Priest v. State*, 261 Ga. 651, 409 S.E.2d 657 (1991).

**Sentence as evidence.** — First offender sentences, under this section, which avoid convictions, may be used for impeachment purposes as if a conviction had been entered. *Miller v. State*, 162 Ga. App. 730, 292 S.E.2d 102 (1982).

Notwithstanding the fact that under this article a conviction does not result unless the person sentenced fails to complete satisfactorily the probationary period, the record of a first offender sentence may be used to impeach a witness in a civil action. *Hightower v. GMC*, 175 Ga. App. 112, 332 S.E.2d 336 (1985), overruled on other grounds, *Pender v. Witcher*, 196 Ga. App. 856, 397 S.E.2d 193 (1990), *aff'd*, 255 Ga. 349, 338 S.E.2d 426 (1986).

**Consideration for plea agreement.** — Granting first offender treatment to defendant for crimes for which he could have been barred from seeking office for ten years constituted consideration for a plea agreement. *State v. Barrett*, 215 Ga. App. 401, 451 S.E.2d 82 (1994), *rev'd* on other grounds, 265 Ga. 489, 458 S.E.2d 620 (1995).

**Opportunity for rehabilitation.** — If offender does not take advantage of opportunity for rehabilitation, his trial which has been suspended is continued and an adjudication of guilt is made and a sentence entered. *State v. Wiley*, 233 Ga. 316, 210 S.E.2d 790 (1974).

If, by violating terms of his probation, defendant shows that he is not worthy of the offered opportunity for rehabilitation then, and only then is he sentenced to penitentiary. No former adjudication of guilt having been made and no prior sentence having been entered thereon, the defendant is subject to receive any sentence permitted by law for the offense he has been found guilty of committing. *State v. Wiley*, 233 Ga. 316, 210 S.E.2d 790 (1974).

**Type of evidence necessary to support revocation.** — Only slight evidence of the occurrence of probation violation will support a revocation. *Crawford v. State*, 166 Ga. App. 272, 304 S.E.2d 443 (1983); *Anderson v. State*, 177 Ga. App. 130, 338 S.E.2d 716 (1985).

As in probation revocation proceedings,

only slight evidence is necessary to support a termination of probation under the first offender statute. *Evans v. State*, 185 Ga. App. 805, 366 S.E.2d 165 (1988).

A certified copy of a criminal conviction constitutes sufficient evidence of a violation of the stated term of probation. *Crawford v. State*, 166 Ga. App. 272, 304 S.E.2d 443 (1983).

The better practice would be to introduce evidence of the criminal offense underlying the conviction as well as a certified copy of the conviction itself. If that is done, the fact that the conviction is reversed on appeal because of error, or because the evidence does not support a finding of guilt beyond a reasonable doubt, will not vitiate a revocation of probation properly based on slight evidence of the criminal offense. *Crawford v. State*, 166 Ga. App. 272, 304 S.E.2d 443 (1983).

**Adjudication of guilt upon violation of probation or conviction for other crime.** — Where no adjudication of guilt had been made and no prior sentence had been entered, it is clear that if an individual on probation under the First Offender Act violates the terms of his probation or is convicted for another crime, the trial court may enter an adjudication of guilt and impose any sentence permitted by law for the offense he has been found guilty of committing. *Beasley v. State*, 165 Ga. App. 160, 299 S.E.2d 886 (1983).

**Sentence after expiration of first offender probation period.** — Trial court had jurisdiction to impose sentence on drug possession charges based upon defendant's violation of probation imposed for those offenses even though his three-year period of first offender probation had already expired, where the state had filed a petition for imposition of sentence prior to expiration of the probation period. *State v. Boyd*, 189 Ga. App. 617, 377 S.E.2d 11 (1988), *cert. denied*, 490 U.S. 1111, 109 S. Ct. 3168, 104 L. Ed. 2d 1030 (1989).

**Length of sentence.** — When person on probation as first offender violates terms of his probation and adjudication of guilt is entered pursuant to this section, he is subject to receive any sentence permitted by law, including a sentence greater than the period to be served on probation which was originally imposed under first offender law. Aus-

tin v. State, 162 Ga. App. 709, 293 S.E.2d 10 (1982).

Where defendant was informed at time he was originally placed on probation that he could receive full sentence upon violation of his probation, court, in revoking his probation, did not lack authority to impose a 10-year sentence on ground that first-offender sentencing document entered by court imposed only five years. Griffin v. State, 163 Ga. App. 871, 295 S.E.2d 863 (1982).

**Time served on probation credited to sentence after probation revoked.** — When a probationer is sentenced to serve time in a penal institution for the offense for which he has spent time on probation, that probation time must be credited to any sentence received, including cases involving first offender probation. Stephens v. State, 245 Ga. 835, 268 S.E.2d 330 (1980); Perdue v. State, 155 Ga. App. 802, 272 S.E.2d 766 (1980); Lillard v. State, 156 Ga. App. 54, 274 S.E.2d 96 (1980); Howell v. State, 159 Ga. App. 577, 284 S.E.2d 82 (1981).

When first offender probation under subsection (b) is revoked, credit must be given for time served on probation. Tallant v. State, 187 Ga. App. 138, 369 S.E.2d 789 (1988).

**Increased sentence on revocation proper.** — The trial court does not err in imposing a greater sentence on defendant than the original first offender sentence, in revoking defendant's earlier probation, where the first offender sentence of probation plainly stated, "If such probation is revoked or cancelled, the court may adjudge the defendant guilty of the above offense and impose any sentence permitted by law for the ... offense." Crawford v. State, 166 Ga. App. 272, 304 S.E.2d 443 (1983).

**Confinement not "incarceration."** Sentence of defendant based on first offender treatment, to five years' probation, conditioned upon successive periods of confinement in a detention center, a diversion center, and in defendant's house under intensive supervision, was authorized and such does not constitute incarceration, which refers to continuous and uninterrupted custody in a jail or penitentiary. Penaherrera v. State, 211 Ga. App. 162, 438 S.E.2d 661 (1993).

**Trial court erred in imposing greater sentence than revoked term of four years' probation, and in refusing to give defendant credit for time served on probation.** Lillard v. State, 156 Ga. App. 54, 274 S.E.2d 96 (1980).

Trial court violated original sentencing order by imposing new sentence greater than that originally imposed and erred in failing to give credit for time served on probation. Saladine v. State, 165 Ga. App. 836, 302 S.E.2d 739 (1983).

**Failure to pay fine.** — Sentencing court could not revoke probation for failure to pay fine and restitution, absent evidence and findings that defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate. Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

**Revocation sentence not error.** See Beeks v. State, 169 Ga. App. 499, 313 S.E.2d 760 (1984).

**Cited in** Sims v. Fox, 492 F.2d 1088 (5th Cir. 1974); Davenport v. State, 136 Ga. App. 913, 222 S.E.2d 644 (1975); Dailey v. State, 136 Ga. App. 866, 222 S.E.2d 682 (1975); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48 (1976); Johnson v. GMC, 144 Ga. App. 305, 241 S.E.2d 30 (1977); Crawford v. State, 144 Ga. App. 622, 241 S.E.2d 492 (1978); Heath v. State, 148 Ga. App. 559, 252 S.E.2d 4 (1978); Dominy v. Mays, 150 Ga. App. 187, 257 S.E.2d 317 (1979); Hogan v. State, 158 Ga. App. 495, 280 S.E.2d 891 (1981); Bearden v. State, 161 Ga. App. 640, 288 S.E.2d 662 (1982); Austin v. State, 162 Ga. App. 709, 293 S.E.2d 10 (1982); Puckett v. State, 163 Ga. App. 156, 293 S.E.2d 544 (1982); Burney v. State, 165 Ga. App. 268, 299 S.E.2d 756 (1983); Gilstrap v. State, 250 Ga. 814, 301 S.E.2d 277 (1983); Sultenfuss v. State, 169 Ga. App. 618, 314 S.E.2d 459 (1984); Kirby v. State, 170 Ga. App. 11, 316 S.E.2d 23 (1984); Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985); Goforth v. Wigley, 178 Ga. App. 538, 343 S.E.2d 788 (1986); Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987); Moreland v. State, 183 Ga. App. 113, 358 S.E.2d 276 (1987); Littlejohn v. State, 191 Ga. App. 852, 383 S.E.2d 332 (1989); Mobley v. State, 192 Ga. App. 719, 386 S.E.2d 384 (1989); Mays v. State, 200 Ga. App. 457, 408 S.E.2d 714 (1991); State v. Mohamed, 203 Ga. App. 21, 416 S.E.2d 358 (1992).



# OPINIONS OF THE ATTORNEY GENERAL

**Legislative intent.** — General Assembly's intent was to allow, within court's discretion, defendant to avail himself of first offender treatment for crime or crimes growing out of same conduct which may be the subject of multicount indictment. 1975 Op. Att'y Gen. No. U75-85.

General Assembly intended first offender probation to have a different result from ordinary periods of probation. 1978 Op. Att'y Gen. No. U78-21.

It was the intent of the General Assembly to give the trial judges authority to permit certain defendants, whom they believed to be worthy of an opportunity not to have a record of adjudication of guilt or a criminal offense, to undergo a period of probation, which if successfully completed would result in their being discharged without there ever being an adjudication of guilt. 1978 Op. Att'y Gen. No. U78-21.

First offender probation is intended to have a different result from ordinary periods of probation. It was the intent of the General Assembly when it enacted this section to give the trial judges authority to permit those defendants whom they believed to be worthy of an opportunity not to have a record of adjudication of guilt for a criminal offense to serve a period of probation, which if successfully completed would result in their being completely exonerated without there ever being any adjudication of guilt. 1980 Op. Att'y Gen. No. 80-79.

**Probation administered prior to adjudication of guilt.** — Probation administered pursuant to this section is administered prior to adjudication of guilt. 1981 Op. Att'y Gen. No. U81-12.

**A plea of guilty** under this article does not fall under rule that such plea, when accepted and entered up, is tantamount to a conviction. 1971 Op. Att'y Gen. No. U71-87.

**Payment of fine.** — Superior court judge may impose payment of fine as term and condition of probation for a defendant being treated under this article. 1975 Op. Att'y Gen. No. U75-42.

**Applicability of § 42-8-65.** — Provision of § 42-8-65 regarding release of record of discharge applies to records in cases where finding of guilt was made, pursuant to conviction or plea, but where adjudication of

guilt was withheld pending successful completion of probation. 1981 Op. Att'y Gen. No. U81-32.

**Split sentences.** — A sentencing court may impose a "split sentence" of a period of incarceration followed by a period of probation on defendants subject to this section. 1985 Op. Att'y Gen. No. 85-40.

**When sentence begins to run.** — A sentence imposed subsequent to revocation of first offender probation should run from date sentence is imposed. 1976 Op. Att'y Gen. No. 76-16.

**Revocation by court in circuit where probation imposed.** — Only the circuit imposing first offender probation may revoke that period of probation, even though supervision has been transferred to another judicial circuit. 1980 Op. Att'y Gen. No. 80-79.

**Applicant for pistol permit.** — An applicant for a license to carry a pistol or revolver under § 16-11-129 who has successfully completed, or who has been released prior to termination of the probationary period under this article, does not have to be free from all restraint or supervision for a specified period of years before applying for a pistol permit, since the successful completion of the period of probation has resulted in there being no adjudication of guilt and, therefore, no conviction. 1978 Op. Att'y Gen. No. U78-21.

**Firefighter's qualifications not affected.** — Person serving probation under this section not convicted for purposes of Georgia Firefighter Standards and Training Act. (T. 25, Ch. 4, Art. 1). 1981 Op. Att'y Gen. No. U81-12.

Fulfillment of terms of probation under this section or release by court prior to termination of period of probation is not a criminal conviction for purposes of Georgia Firefighter Standards and Training Act (T. 25, Ch. 4, Art. 1). 1981 Op. Att'y Gen. No. U81-12.

Individual in process of serving period of probation under this section should be treated, for purposes of Georgia Firefighter Standards and Training Act (T. 25, Ch. 4, Art. 1), in same manner as individual who has satisfactorily fulfilled terms of or who has been released from such probation. 1981 Op. Att'y Gen. No. U81-12.



**First offender treatment not "conviction" under Drug-free Workplace Act.** — First offender treatment upon a verdict or plea of guilty is not a "conviction" within the meaning of the Drug-free Workplace Act (§ 45-23-1 et seq.), applicable to public employees. 1992 Op. Att'y Gen. No. 92-10.

**First offender treatment is "conviction"**

**under Drug-free Campus Act.** — First offender treatment upon a verdict or plea of guilty is a "conviction" within the meaning of the Drug-free Postsecondary Education Act of 1990 (§ 20-1-20 et seq.), applicable to students in institutions of higher learning. 1992 Op. Att'y Gen. No. 92-10.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1549-1568.

**ALR.** — Plea of nolo contendere or non vult contendere, 89 ALR2d 540.

Propriety, in imposing sentence for origi-

nal offense after revocation of probation, of considering acts because of which probation was revoked, 65 ALR3d 1100.

Acquittal in criminal proceeding as precluding revocation of probation on same charge, 76 ALR3d 564.

### 42-8-61. Defendant to be informed of terms of article at time sentence imposed.

The defendant shall be informed of the terms of this article at the time of imposition of sentence. (Ga. L. 1968, p. 324, § 3; Ga. L. 1982, p. 1807, § 2.)

### JUDICIAL DECISIONS

**Cited in** Bethea County v. Dixon, 72 Ga. App. 384, 33 S.E.2d 723 (1945); Sims v. Fox, 492 F.2d 1088 (5th Cir. 1974); Johnson v.

GMC, 144 Ga. App. 305, 241 S.E.2d 30 (1977); Dominy v. Mays, 150 Ga. App. 187, 257 S.E.2d 317 (1979).

### 42-8-62. Discharge of defendant without adjudication of guilt.

(a) Upon fulfillment of the terms of probation, upon release by the court prior to the termination of the period thereof, or upon release from confinement, the defendant shall be discharged without court adjudication of guilt. The discharge shall completely exonerate the defendant of any criminal purpose and shall not affect any of his civil rights or liberties; and the defendant shall not be considered to have a criminal conviction. It shall be the duty of the clerk of court to enter on the criminal docket and all other records of the court pertaining thereto the following:

"Discharge filed completely exonerates the defendant of any criminal purpose and shall not affect any of his civil rights or liberties; and the defendant shall not be considered to have a criminal conviction. O.C.G.A. 42-8-62."

Such entry shall be written or stamped in red ink, dated, and signed by the person making such entry or, if the docket or record is maintained using computer print-outs, microfilm, or similar means, such entry shall be

underscored, boldface, or made in a similar conspicuous manner and shall be dated and include the name of the person making such entry. The criminal file, docket books, criminal minutes and final record, and all other records of the court relating to the offense of a defendant who has been discharged without court adjudication of guilt pursuant to this subsection shall not be altered as a result of that discharge, except for the entry of discharge thereon required by this subsection, nor shall the contents thereof be expunged or destroyed as a result of that discharge.

(b) Should a person be placed under probation or in confinement under this article, a record of the same shall be forwarded to the Georgia Crime Information Center. Without request of the defendant a record of discharge and exoneration, as provided in this Code section, shall in every case be forwarded to the Georgia Crime Information Center. In every case in which the record of probation or confinement shall have been previously forwarded to the Department of Corrections, to the Georgia Crime Information Center, and to the Identification Division of the Federal Bureau of Investigation and a record of a subsequent discharge and exoneration of the defendant has not been forwarded as provided in this Code section, upon request of the defendant or his attorney or representative, the record of the same shall be forwarded by the clerk of court so as to reflect the discharge and exoneration. (Ga. L. 1968, p. 324, § 2; Ga. L. 1978, p. 1621, § 1; Ga. L. 1982, p. 1807, § 3; Ga. L. 1985, p. 283, § 1; Ga. L. 1986, p. 442, § 1; Ga. L. 1990, p. 735, § 1.)

### JUDICIAL DECISIONS

**Probation sentence merely preliminary.** — Any probationary sentence entered under this section is preliminary only, and, if completed without violation, permits offender complete rehabilitation without stigma of felony conviction. If, however, such offender does not take advantage of such opportunity for rehabilitation, his trial which, in effect, has been suspended is continued and an adjudication of guilt is made and a sentence entered. *State v. Wiley*, 233 Ga. 316, 210 S.E.2d 790 (1974).

**Restrictions may be imposed during service of first offender term.** — Subsection (a) allows a defendant's slate to be wiped clean for the purposes of recordation of a criminal conviction and its effect on civil rights or liberties after a defendant successfully fulfills the first offender terms. It does not prohibit restrictions on a defendant's civil rights or liberties imposed during service of the first offender term. *Salomon v. Earp*, 190 Ga. App. 405, 379 S.E.2d 217 (1989), overruled

on other grounds, *Pender v. Witcher*, 196 Ga. App. 856, 397 S.E.2d 193 (1990).

**Defendant's driver's license was properly suspended** after she pled guilty to, and received sentences as a first offender for, two counts of homicide by vehicle in the first degree and one count of driving with ability impaired by alcohol. *Salomon v. Earp*, 190 Ga. App. 405, 379 S.E.2d 217 (1989), overruled on other grounds, *Pender v. Witcher*, 196 Ga. App. 856, 397 S.E.2d 193 (1990).

**Use of prior prosecution in which defendant given first offender treatment.** — As a result of the changes made in 1985 to this section, the use of a prior prosecution in which defendant was given first offender treatment and successfully completed the terms of his probated sentence "is not allowable by law" as provided in § 42-8-65. Accordingly, the portion of the case in which defendant was sentenced under subsection (a) of § 17-10-7 as a repeat offender had to be reversed and remanded for resentencing. *Queen v. State*, 182 Ga. App. 794, 357 S.E.2d

150 (1987) (holding Op. Att'y Gen. U81-32 incorrectly states present law).

**Impeachment of witness through first-offender record.** — Trial court erred in refusing to allow defendant to impeach witness with her first offender record, although she has fulfilled the terms of her probation. *Gilstrap v. State*, 250 Ga. 814, 301 S.E.2d 277 (1983).

**Admissibility in civil actions.** — Evidence of a first offender's guilty plea is not admissible for the purpose of impeaching a witness by showing him to have been convicted of a crime involving moral turpitude, even though it is admissible in a civil trial to impeach an adverse witness by disproving or contradicting his testimony. *Witcher v. Pender*, 260 Ga. 248, 392 S.E.2d 6 (1990).

**"Rehabilitation" within meaning of federal rule.** — Section did not provide for "rehabilitation" within the meaning of Rule 609(c), Fed. R. Evid., which prohibits evidence of a prior conviction for purposes of impeachment if the conviction has been the

subject of a "rehabilitation." *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. ), rehearing denied, 764 F.2d 1411 (11th Cir. 1985).

**Guilty plea under first offender inadmissible.** — Trial court erred in admitting testimony and documents concerning defendant's entry of the first offender guilty plea to commercial gambling where defendant was still on probation at the time of the condemnation trial, and because it was not used for impeachment purposes, its use was prohibited. *Jones v. State*, 212 Ga. App. 682, 442 S.E.2d 880 (1994).

**Cited in** *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); *Johnson v. GMC*, 144 Ga. App. 305, 241 S.E.2d 30 (1977); *Dominy v. Mays*, 150 Ga. App. 187, 257 S.E.2d 317 (1979); *Moore v. Kemp*, 809 F.2d 702 (11th Cir. 1987); *Romano v. State*, 193 Ga. App. 682, 388 S.E.2d 757 (1989); *Tilley v. State*, 197 Ga. App. 97, 397 S.E.2d 506 (1990); *Melton v. State*, 216 Ga. App. 215, 454 S.E.2d 545 (1995).

## OPINIONS OF THE ATTORNEY GENERAL

**Probation sentence not necessarily conviction.** — Placing of an individual on probation does not by itself result in a conviction and any person serving such a probation has not suffered a conviction which would disfranchise him; he therefore would be eligible to vote. 1974 Op. Att'y Gen. No. 74-26.

**Fulfillment of probation terms or early release not criminal conviction.** — The fulfillment of the terms of probation under this article or the release by the presiding court prior to termination of a period of probation is not a criminal conviction for purposes of Ch. 4, T. 25. 1976 Op. Att'y Gen. No. 76-130.

**Placement or discharge of person from first offender probation** is disposition to be accurately recorded, maintained, and re-

ported by Georgia Crime Information Center. 1975 Op. Att'y Gen. No. 75-110.

**Confidentiality of first offender records.** — The confidentiality provisions of the First Offender Act having been repealed at the 1990 session of the General Assembly, the court records of first offenders are, subject to the requirement in subsection (a) for a red ink marking on the records, public records subject to public inspection and viewing in the same manner as other records of criminal actions in the office of the clerk of the superior court. Thus, except as otherwise provided by law, these documents are public records which are subject to public viewing and inspection. 1991 Op. Att'y Gen. No. U91-5.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579, 1022-1035.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1549-1568.



**42-8-63. Effect of discharge under article on eligibility for employment or appointment to office.**

Except as otherwise provided in this article, a discharge under this article is not a conviction of a crime under the laws of this state and may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector. (Ga. L. 1978, p. 1621, § 2.)

**JUDICIAL DECISIONS**

**Expungement upon completion of probation** of the records of first offender treatment of criminal defendants runs contrary to the intent and the practical operation of the First Offender Act. *State v. C.S.B.*, 250

Ga. 261, 297 S.E.2d 260 (1982).

Cited in *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); *Green v. State*, 169 Ga. App. 71, 311 S.E.2d 505 (1983).

**OPINIONS OF THE ATTORNEY GENERAL**

**Employer using first offender discharge to disqualify job applicant.** — This section prohibits an employer from using a discharge under the first offender statute to disqualify a person in any application for employment or appointment in either the public or private sector; however, a discharge under the first offender treatment does not insulate

the employee from the appropriate personnel action for the underlying facts that supported the initial criminal action nor does it bar an employer from considering the employee's guilty plea as an admission against interest in a subsequent personnel action. 1986 Op. Att'y Gen. No. U86-25.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579, 1022-1035.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1549-1568.

**42-8-64. Appeal of sentence imposed under article.**

A defendant sentenced pursuant to this article shall have the right to appeal in the same manner and with the same scope and same effect as if a judgment of conviction had been entered and appealed from. (Ga. L. 1968, p. 324, § 5.)

**JUDICIAL DECISIONS**

**Need written order or judgment.** — The Court of Appeals lacks jurisdiction to entertain an appeal under § 5-6-34(a) from a conviction upon imposition of first-offender status absent a written trial court order imposing first offender status upon the defendant or a written judgment of conviction and

sentence. *Littlejohn v. State*, 185 Ga. App. 31, 363 S.E.2d 327 (1987).

**Direct appeal from conviction.** — Section provides defendant direct appeal from conviction upon imposition of first-offender status, notwithstanding the absence of a formal and final "adjudication of guilt." *Dean v.*

State, 177 Ga. App. 123, 338 S.E.2d 711 (1985).

**Appeal from revocation of probationary status granted under First Offender Act.** — Appeal from adjudication of guilt and sentence serving to revoke probationary status granted under the First Offender Act is by discretionary appeal, as provided in § 5-6-35(a)(5), rather than direct appeal. *Dean v. State*, 177 Ga. App. 123, 338 S.E.2d 711 (1985); *Anderson v. State*, 177 Ga. App. 130, 338 S.E.2d 716 (1985).

**Failure to appeal accepted sentence.** —

Where defendant was apparently satisfied with his sentence at time it was entered as he did not appeal from it as was his right, and he also readily accepted benefits of first offender treatment and probation, he will not be heard to complain that the fine was excessive. *Brainard v. State*, 246 Ga. 586, 272 S.E.2d 683 (1980).

**Cited in** *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); *Johnson v. GMC*, 144 Ga. App. 305, 241 S.E.2d 30 (1977); *Dominy v. Mays*, 150 Ga. App. 187, 257 S.E.2d 317 (1979).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579. 59 Am. Jur. 2d, Pardon and Parole, § 43.

**C.J.S.** — 24 C.J.S., Criminal Law, §§ 1549-1568.

**ALR.** — Acceptance of probation, parole, or suspension of sentence as waiver of error or right to appeal or to move for new trial, 117 ALR 929.

#### **42-8-65. Use of prior finding of guilt in subsequent prosecutions; release of records of discharge; modification of records to reflect conviction; effect of confinement sentence where guilt not adjudicated.**

(a) If otherwise allowable by law in any subsequent prosecution of the defendant for any other offense, a prior finding of guilt may be pleaded and proven as if an adjudication of guilt had been entered and relief had not been granted pursuant to this article.

(b) The records of the Georgia Crime Information Center shall be modified, without a court order, to show a conviction in lieu of treatment as a first offender under this article whenever the conviction of a person for another crime during the term of probation is reported to the Georgia Crime Information Center. If a report is made showing that such person has been afforded first offender treatment under this article on more than one occasion, the Georgia Crime Information Center may report information on first offender treatments subsequent to the first such first offender treatment as if they were convictions. Such records may be disseminated by the Georgia Crime Information Center in the same manner and subject to the same restrictions as any other records of convictions.

(c) Notwithstanding any other provision of this article, any person who is sentenced to a term of confinement pursuant to paragraph (2) of subsection (a) of Code Section 42-8-60 shall be deemed to have been convicted of the offense during such term of confinement for all purposes except that records thereof shall be treated as any other records of first offenders under this article and except that such presumption shall not continue after completion of such person's confinement sentence. Upon completion of

the confinement sentence, such person shall be treated in the same manner and the procedures to be followed by the court shall be the same as in the case of a person placed on probation under this article. (Ga. L. 1968, p. 324, § 4; Ga. L. 1978, p. 1621, § 3; Ga. L. 1982, p. 1807, § 4; Ga. L. 1983, p. 3, § 31; Ga. L. 1985, p. 283, § 1; Ga. L. 1985, p. 380, § 2; Ga. L. 1990, p. 735, § 2; Ga. L. 1994, p. 97, § 42.)

**Code Commission notes.** — Ga. L. 1985, p. 380 cited "Code Section 40-8-60" in present subsection (c). Pursuant to Code Section 28-9-5, this has been changed to "Code Section 42-8-60."

**Editor's notes.** — Section 3 of Ga. L. 1985, p. 380, not codified by the General Assembly, provided as follows: "Subsection (d) [now

subsection (c)] of Code Section 42-8-65 of the Official Code of Georgia Annotated enacted by Section 2 of this Act shall be repealed upon the ratification of an amendment to the Constitution extending the jurisdiction of the State Board of Pardons and Paroles to consider cases covered by Code Section 42-8-60."

### JUDICIAL DECISIONS

**Prior first conviction under prior law considered.** — Inasmuch as the defendant's first criminal proceeding was not handled under the "first offender" statute, which was not in effect at that time, he was not eligible to claim the benefits which inure to those who are afforded treatment thereunder. Accordingly, the trial court did not err in considering his prior conviction in the sentencing phase of the present trial. *Woods v. State*, 187 Ga. App. 105, 369 S.E.2d 353 (1988).

**Prior prosecution in which defendant given first offender treatment.** — As a result of the changes made in 1985 to § 42-8-60, the use of a prior prosecution in which defendant was given first offender treatment

and successfully completed the terms of his probated sentence is not "allowable by law" as provided in this section. Accordingly, this portion of the case in which defendant was sentenced under § 17-10-7(a) had to be reversed and remanded for resentencing. *Queen v. State*, 182 Ga. App. 794, 357 S.E.2d 150 (1987) (holding Op. Att'y Gen. U81-32 incorrectly stated present law).

**Cited in** *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); *Johnson v. GMC*, 144 Ga. App. 305, 241 S.E.2d 30 (1977); *Dominy v. Mays*, 150 Ga. App. 187, 257 S.E.2d 317 (1979); *Miller v. State*, 162 Ga. App. 730, 292 S.E.2d 102 (1982); *Tilley v. State*, 197 Ga. App. 97, 397 S.E.2d 506 (1990).

### OPINIONS OF THE ATTORNEY GENERAL

**Cases to which section applies.** — Provision of this section regarding release of record of discharge applies to records in cases where finding of guilt was made, pursuant to conviction or plea. 1981 Op. Att'y Gen. No. U81-32.

**Confidentiality of first offender records.** — The confidentiality provisions of the First Offender Act having been repealed at the 1990 session of the General Assembly, the court records of first offenders are, subject

to the requirement in § 42-8-62(a) for a red ink marking on the records, public records subject to public inspection and viewing in the same manner as other records of criminal actions in the office of the clerk of the superior court. Thus, except as otherwise provided by law, these documents are public records which are subject to public viewing and inspection. 1991 Op. Att'y Gen. No. U91-5.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 567-579.

**ALR.** — What constitutes "minor traffic infraction" excludible from calculation of



defendant's criminal history under United States sentencing guidelines § 4A1.2(c)(2), 113 ALR Fed. 561.

#### ARTICLE 4

### PARTICIPATION OF PROBATIONERS IN COMMUNITY SERVICE PROGRAMS

#### **42-8-70. Definitions; unlawful to use offender for private gain except under certain circumstances; penalties.**

(a) As used in this article, the term:

(1) "Agency" means any private or public agency or organization approved by the court to participate in a community service program.

(2) "Community service" means uncompensated work by an offender with an agency for the benefit of the community pursuant to an order by a court as a condition of probation. Such term also means uncompensated service by an offender who lives in the household of a disabled person and provides aid and services to such disabled individual, including, but not limited to, cooking, housecleaning, shopping, driving, bathing, and dressing.

(3) "Community service officer" means an individual appointed by the court to place and supervise offenders sentenced to community service. Such term may mean a paid professional or a volunteer.

(b) Except as provided in subsection (c) of this Code section, it shall be unlawful for an agency or community service officer to use or allow an offender to be used for any purpose resulting in private gain to any individual.

(c) Subsection (b) of this Code section shall not apply to:

(1) Services provided by an offender to a disabled person in accordance with paragraph (1) of subsection (c) of Code Section 42-8-72;

(2) Work on private property because of a natural disaster; or

(3) An order or direction by the sentencing judge.

(d) Any person who violates subsection (b) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1982, p. 1257, § 1; Code 1981, § 42-8-70, enacted by Ga. L. 1982, p. 1257, § 6; Ga. L. 1983, p. 3, § 31; Ga. L. 1983, p. 1593, § 1; Ga. L. 1991, p. 1302, § 1.)

#### OPINIONS OF THE ATTORNEY GENERAL

**Community service not authorized for unemployment fraud.** — This chapter does not authorize the imposition of a criminal sentence for unemployment fraud that permits

community service in lieu of restitution of overpaid benefits to the Department of Labor. 1993 Op. Att'y Gen. No. 93-15.

**42-8-71. Application for participation in community service program; assignment of offenders; violations of court orders or article; limitation of liability.**

(a) Agencies desiring to participate in a community service program shall file with the court a letter of application showing:

- (1) Eligibility;
- (2) Number of offenders who may be placed with the agency;
- (3) Work to be performed by the offender; and
- (4) Provisions for supervising the offender.

(b) An agency selected for the community service program shall work offenders who are assigned to the agency by the court. If an offender violates a court order, the agency shall report such violation to the community service officer.

(c) If an agency violates any court order or provision of this article, the offender shall be removed from the agency and the agency shall no longer be eligible to participate in the community service program.

(d) No agency or community service officer shall be liable at law as a result of any of his acts performed while participating in a community service program. This limitation of liability does not apply to actions on the part of any agency or community service officer which constitute gross negligence, recklessness, or willful misconduct. (Ga. L. 1982, p. 1257, § 2; Code 1981, § 42-8-71, enacted by Ga. L. 1982, p. 1257, § 6; Ga. L. 1984, p. 592, § 1.)

**42-8-72. Community service as condition of probation; determination of appropriateness of community service for particular offender; service as live-in attendant for disabled person; community service in lieu of incarceration; community service as discipline.**

(a) Community service may be considered as a condition of probation with primary consideration given to the following categories of offenders:

- (1) Traffic violations;
- (2) Ordinance violations;
- (3) Noninjurious or nondestructive, nonviolent misdemeanors;
- (4) Noninjurious or nondestructive, nonviolent felonies; and
- (5) Other offenders considered upon the discretion of the judge.

(b) The judge may confer with the prosecutor, defense attorney, probation supervisor, community service officer, or other interested persons to determine if the community service program is appropriate for an offender. If community service is ordered as a condition of probation, the court shall order:

(1) Not less than 20 hours nor more than 250 hours in cases involving traffic or ordinance violations or misdemeanors, said service to be completed within one year; or

(2) Not less than 20 hours nor more than 500 hours in felony cases, said service to be completed within three years.

(c) (1) Any agency may recommend to the court that certain disabled persons are in need of a live-in attendant. The judge shall confer with the prosecutor, defense attorney, probation supervisor, community service officer, or other interested persons to determine if a community service program involving a disabled person is appropriate for an offender. If community service as a live-in attendant for a disabled person is deemed appropriate and if both the offender and the disabled person consent to such service, the court may order such live-in community service as a condition of probation but for no longer than two years.

(2) The agency shall be responsible for coordinating the provisions of the cost of food or other necessities for the offender which the disabled person is not able to provide. The agency, with the approval of the court, shall determine a schedule which will provide the offender with certain free hours each week.

(3) Such live-in arrangement shall be terminated by the court upon the request of the offender or the disabled person. Upon termination of such an arrangement, the court shall determine if the offender has met the conditions of probation.

(4) The appropriate agency shall make personal contact with the disabled person on a frequent basis to ensure the safety and welfare of the disabled person.

(d) The judge may order an offender to perform community service hours in a 40 hour per week work detail in lieu of incarceration.

(e) Community service hours may be added to original court ordered hours as a disciplinary action by the court or as an additional requirement of any program in lieu of incarceration. (Ga. L. 1982, p. 1257, § 3; Code 1981, § 42-8-72, enacted by Ga. L. 1982, p. 1257, § 6; Ga. L. 1983, p. 1593, § 2; Ga. L. 1989, p. 331, § 1.)

**Delayed effective date.** — The 1995 amendment becomes effective only when funds are specifically appropriated for the purposes of this Code section in an Appro-

priations Act making specific reference to Ga. L. 1995, p. 396, § 1. This Code section as amended is not set out above, owing to the delayed effective date. Funds were not ap-



propriated at the 1995, 1996, or 1997 sessions. After the appropriation is made, this Code section will reflect the following changes: the following language will be inserted at the beginning of subsection (a): "In all cases other than cases provided for under subsection (g) of this Code section,"; there will be a subsection (f), which will provide: "No community service which would expose the general public to the person on probation shall be permitted for sex offenders or offenders considered to be dangerous by the judge or prosecutor." and there will be a subsection (g), which will provide: "(1) In pilot project judicial circuits under this subsection, community service shall be a condition of probation in all cases involving felony or misdemeanor sentences from a state court or a superior court where incarceration is not part of the sentence. (2) There is established the Community Service Pilot Project. No later than July 1, 1996, the Department of Corrections shall design a Community Service Pilot Project program which meets the requirements of this subsection and by that date shall submit a request to the Judicial Council of Georgia requesting designation of no more than five judicial circuits in this state as pilot project sites. The department shall implement the program in those pilot project judicial circuits no later than the first date upon which those provisions of this subsection have become effective. (3) The Community Service Pilot Project is established for the following purposes: (A) To provide an additional sanction for all other alternative programs; (B) To provide symbolic restitution to victims and increase offenders' positive involvement in the community; (C) To promote the work ethic by requiring offenders to report to work regularly; and (D) To assist nonprofit and government agencies with skilled and unskilled projects. (4) The following offenders shall be exempt from the Community Service Pilot Project: (A) A mentally or physically disabled or incapacitated adult; (B) A caretaker of a mentally or physically

disabled or incapacitated dependent person living in the household; or (C) An adult who is 60 years of age or over. (5)(A) No provision of this subsection shall require or prohibit any expenditure of local funds for the purposes of this subsection. (B) In no event shall the receipt of any state funds which are appropriated for the purposes of this subsection be conditioned upon the expenditure of any local funds for the purposes of this subsection. (6) All Community Service Pilot Projects established under this subsection shall terminate on or before June 30, 1999."

**Editor's notes.** — Ga. L. 1995, p. 396, § 3, not codified by the General Assembly, provides "The provisions of Section 1 of this Act may be applied on and after July 1, 1996, to offenses committed on or after that date, contingent upon funding as provided in subsection (a) of Section 4 of this Act. The determination of the five judicial circuits which shall serve as pilot project sites under Section 1 of this Act beginning July 1, 1996, shall be in accordance with guidelines to be developed by the Judicial Council of Georgia after consultation with the Office of Planning and Budget and with the approval of the Supreme Court of Georgia. Such guidelines shall:

"(1) Identify the judicial circuits which shall serve as pilot project sites;

"(2) Reflect the levels of fiscal resources available for implementation of this Act;

"(3) Provide for equal protection of the law to offenders and classes of offenders to whom this Act is to be applied; and

"(4) Provide measures of evaluation of the five pilot projects."

Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): "No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority."

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 287 (1989).

## OPINIONS OF THE ATTORNEY GENERAL

**Contribution by probationer for probation supervisors' insurance.** — A probationer can be required to pay by court order, as a condition of his/her probation, a rea-

sonable amount toward the cost of maintaining insurance to protect probation supervisors from personal liability should probationers be injured while performing

court-ordered community service. 1983 Op. Att'y Gen. No. 83-18.

**Condition prohibiting suing probation supervisors personally.** — A sentencing court may, in its discretion, require a probationer to enter into, as a condition of probation, a covenant not to sue probation supervisors in their personal capacity if the probationer is injured while performing court-ordered community service work. 1983 Op. Att'y Gen. No. 83-18.

**Liability for probationers' injuries.** — De-

partment of Offender Rehabilitation (Corrections) employees, authorized by law to supervise probationers while they are performing approved court-ordered tasks under §§ 42-8-71, 42-8-73 and this section are performing a governmental function as opposed to a ministerial task, and therefore will not be personally liable for injuries to the probationers sustained while performing the tasks unless the department employees' conduct is willful and wanton. 1983 Op. Att'y Gen. No. 83-18.

#### **42-8-73. Placement of offender with appropriate agency; scheduling for employed offenders; supervision; evaluation.**

The community service officer shall place an offender sentenced to community service as a condition of probation with an appropriate agency. The agency and work schedule shall be approved by the court. If the offender is employed at the time of sentencing or if the offender becomes employed after sentencing, the community service officer shall consider the offender's work schedule and, to the extent practicable, shall schedule the community service so that it will not conflict with the offender's work schedule. This shall not be construed as requiring the community service officer to alter scheduled community service based on changes in an offender's work schedule. The community service officer shall supervise the offender for the duration of the community service sentence. Upon completion of the community service sentence, the community service officer shall prepare a written report evaluating the offender's performance which will be used to determine if the conditions of probation have been satisfied. (Ga. L. 1982, p. 1257, § 4; Code 1981, § 42-8-73, enacted by Ga. L. 1982, p. 1257, § 6; Ga. L. 1984, p. 367, § 1.)

#### **RESEARCH REFERENCES**

**ALR.** — Probation officer's liability for negligent supervision of probationer, 44 ALR4th 638.

#### **42-8-74. Applicability of Articles 2 and 3 of chapter; awarding of good-time allowance for offender providing live-in community service.**

(a) The provisions of Article 2 of this chapter, relating to probation, termination of probation, and revocation of probation, shall be applicable to offenders sentenced to community service as a condition of probation pursuant to this article. The provisions of Article 3 of this chapter, relating to probation of first offenders, shall be applicable to first offenders sentenced pursuant to this article.

(b) Any offender who provides live-in community service but who is later incarcerated for breaking the conditions of probation or for any other cause may be awarded good time for each day of live-in community service the same as if such offender was in prison for such number of days. (Ga. L. 1982, p. 1257, § 5; Code 1981, § 42-8-74, enacted by Ga. L. 1982, p. 1257, § 6; Ga. L. 1983, p. 3, § 31; Ga. L. 1983, p. 1593, § 3.)

## ARTICLE 5

### PRETRIAL RELEASE AND DIVERSION PROGRAMS

**Editor's notes.** — Section 3 of the 1984 Act that enacted this article provided as follows: "Provided, however, no person shall be released on his own recognizance or approved for said program, without first having the approval, in writing, of the judge

of the court having jurisdiction of the case." This section of the 1984 Act was not codified by the General Assembly. See, however, Code Section 42-8-84, part of a 1985 Act to correct errors and omissions in the Code.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 111 et seq.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, § 116 et seq.

#### **42-8-80. Establishment and operation; rules and regulations.**

The Department of Corrections shall be authorized to establish and operate pretrial release and diversion programs as rehabilitative measures for persons charged with misdemeanors and felonies for which bond is permissible under the law in the courts of this state prior to conviction; provided, however, that no such program shall be established in a county without the unanimous approval of the superior court judges, the district attorney, the solicitor-general where applicable, and the sheriff of such county. The Board of Corrections shall promulgate rules and regulations governing any pretrial release and diversion programs established and operated by the department and shall grant authorization for the establishment of such programs based on the availability of sufficient staff and resources. (Code 1981, § 42-8-80, enacted by Ga. L. 1984, p. 367, § 2; Ga. L. 1985, p. 283, § 1; Ga. L. 1996, p. 748, § 23.)

**The 1996 amendment**, effective July 1, 1996, substituted "solicitor-general" for "solicitor" in the proviso of the first sentence.

**Editor's notes.** — Ga. L. 1996, p. 748, § 27, not codified by the General Assembly, provides: "Notwithstanding any other provision of law, an Act approved February 11, 1854 (Ga. L. 1854, p. 281), which abolished the office of solicitor of the City Court of Savannah, now the State Court of Chatham County, and transferred responsibility for

the prosecution of criminal cases in said court to the solicitor general (now the district attorney) for the Eastern Judicial Circuit is confirmed. It shall be the duty of said district attorney to prosecute all criminal actions in said state court until otherwise specifically provided by law."

Ga. L. 1996, p. 748, § 28, not codified by the General Assembly, provides: "The provisions of this Act shall not affect the powers, duties, or responsibilities of the district attor-



ney as successor to the office of solicitor general under the constitution, statutes, and common law of this state as provided by Code Section 15-18-1."

Ga. L. 1996, p. 748, § 29, not codified by the General Assembly, provides: "Except as otherwise authorized in this Act, on and after July 1, 1996, any reference in general law or in any local Act to the solicitor of a state court shall mean and shall be deemed to mean the solicitor-general of such state court."

Ga. L. 1996, p. 748, § 30, not codified by the General Assembly, provides: "The provi-

sions of paragraph (3) of Code Section 15-18-62, relating to the qualifications for the office of solicitor-general of a state court, shall apply to any person elected or appointed to such office after July 1, 1996. Any person holding such office on July 1, 1996, may continue to hold such office for the remainder of the term to which such person was elected or appointed notwithstanding the fact that such person has not been a member of the State Bar of Georgia for three years if such person is otherwise qualified to hold the office of solicitor-general."

#### **42-8-81. Release of person charged to program.**

The court in which a person is charged with a misdemeanor or felony for which bond is permissible under the law may, upon the application by the person so charged, at its discretion release the person prior to conviction and upon recognizance to the supervision of a pretrial release or diversion program established and operated by the Department of Corrections after an investigation and upon recommendation of the staff of the pretrial release or diversion program. In no case, however, shall any person be so released unless after consultation with his or her attorney or an attorney made available to the person if he or she is indigent that person has voluntarily agreed to participate in the pretrial release or diversion program and knowingly and intelligently has waived his or her right to a speedy trial for the period of pretrial release or diversion. (Code 1981, § 42-8-81, enacted by Ga. L. 1984, p. 367, § 2; Ga. L. 1985, p. 283, § 1; Ga. L. 1989, p. 14, § 42.)

#### **42-8-82. Contracts with counties for services and facilities.**

The Department of Corrections may contract with the various counties of this state for the services and facilities necessary to operate pretrial release and diversion programs established under this article and both the department and the counties are authorized to enter into such contracts as are appropriate to carry out the purpose of this article. (Code 1981, § 42-8-82, enacted by Ga. L. 1984, p. 367, § 2; Ga. L. 1985, p. 283, § 1.)

#### **42-8-83. Pretrial intervention programs.**

The authority to establish and operate pretrial release and diversion programs granted to the Department of Corrections under this article shall not affect the authority of the Georgia Department of Labor to enter into agreements with district attorneys of the several judicial circuits of this state for the purpose of establishing and operating pretrial intervention pro-

grams in such judicial circuits. (Code 1981, § 42-8-83, enacted by Ga. L. 1984, p. 367, § 2; Ga. L. 1985, p. 283, § 1; Ga. L. 1985, p. 708, § 17.)

**42-8-84. Approval required for release.**

No person shall be released on his own recognizance or approved for a pretrial release and diversion program without first having the approval in writing of the judge of the court having jurisdiction of the case. (Code 1981, § 42-8-84, enacted by Ga. L. 1985, p. 149, § 42.)

ARTICLE 6

AGREEMENTS FOR PROBATION SERVICES

**42-8-100. Agreements between chief judges of county courts or judges of municipal courts and corporations, enterprises, or agencies for probation services.**

(a) (1) The chief judge of any court within the county, with the approval of the governing authority of that county, is authorized to enter into written contracts with corporations, enterprises, or agencies to provide probation supervision, counseling, collection services for all moneys to be paid by a defendant according to the terms of the sentence imposed on the defendant as well as any moneys which by operation of law are to be paid by the defendant in consequence of the conviction, and other probation services for persons convicted of a misdemeanor in that court and placed on probation in the county. In no case shall a private probation corporation or enterprise be charged with the responsibility for supervising a felony sentence. The final contract negotiated by the chief judge with the private probation entity shall be attached to the approval by the governing authority of the county to privatize probation services as an exhibit thereto.

(2) The chief judge of any court within the county, with the approval of the governing authority of that county, is authorized to establish a county probation system to provide probation supervision, counseling, collection services for all moneys to be paid by a defendant according to the terms of the sentence imposed on the defendant as well as any moneys which by operation of law are to be paid by the defendant in consequence of the conviction, and other probation services for persons convicted of a misdemeanor in that court and placed on probation in the county.

(b) (1) The judge of the municipal court of any municipality or consolidated government of a municipality and county of this state, with the approval of the governing authority of that municipality or consolidated government, is authorized to enter into written contracts with

private corporations, enterprises, or agencies to provide probation supervision, counseling, collection services for all moneys to be paid by a defendant according to the terms of the sentence imposed and any moneys which by operation of law are to be paid by the defendant in consequence of the conviction, and other probation services for persons convicted in such court and placed on probation. The final contract negotiated by the judge with the private probation entity shall be attached to the approval by the governing authority of the municipality or consolidated government to privatize probation services as an exhibit thereto.

(2) The judge of the municipal court of any municipality or consolidated government of a municipality and county of this state, with the approval of the governing authority of that municipality or consolidated government, is authorized to establish a probation system to provide probation supervision, counseling, collection services for all moneys to be paid by a defendant according to the terms of the sentence imposed and any moneys which by operation of law are to be paid by the defendant in consequence of the conviction, and other probation services for persons convicted in such court and placed on probation. (Code 1981, § 42-8-100, enacted by Ga. L. 1991, p. 1135, § 2; Ga. L. 1992, p. 3221, § 7; Ga. L. 1995, p. 396, § 2; Ga. L. 1996, p. 1107, § 2.)

**The 1995 amendment** effective April 10, 1995, rewrote this Code section.

**The 1996 amendment**, effective April 15, 1996, in subsection (a), in paragraph (1), deleted "general" preceding "probation supervision" in the first sentence and added the last sentence; and deleted "general" preceding "probation supervision" in paragraph (2); and in subsection (b), in paragraph (1), deleted "general" preceding

"probation supervision" in the first sentence and added the last sentence; and deleted "general" preceding "probation supervision" in paragraph (2).

**Editor's notes.** — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): "No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority."

#### **42-8-101. County and Municipal Probation Advisory Council.**

(a) There is created the County and Municipal Probation Advisory Council, to be composed of one superior court judge designated by The Council of Superior Court Judges of Georgia, one state court judge designated by The Council of State Court Judges of Georgia, one municipal court judge designated by the Council of Municipal Court Judges of Georgia, one sheriff appointed by the Governor, one probate court judge designated by The Council of Probate Court Judges of Georgia, one magistrate designated by the Council of Magistrate Court Judges, the commissioner of corrections or his or her designee, one public probation officer appointed by the Governor, one private probation officer or individual with expertise in private probation services by virtue of his or her training or employment appointed by the Governor, one mayor or member of a municipal governing authority appointed by the Governor, and one



county commissioner appointed by the Governor. Members of the council appointed by the Governor shall be appointed for terms of office of four years. With the exceptions of the public probation officer, the county commissioner, the sheriff, the mayor or member of a municipal governing authority, and the commissioner of corrections, each designee or representative shall be employed in their representative capacity in a judicial circuit operating under a contract with a private corporation, enterprise, or agency as provided under Code Section 42-8-100. No person shall serve beyond the time he or she holds the office or employment by reason of which he or she was initially eligible for appointment. In the event of death, resignation, disqualification, or removal for any reason of any member of the council, the vacancy shall be filled in the same manner as the original appointment and any successor shall serve for the unexpired term. Such council shall promulgate rules and regulations regarding contracts or agreements for probation services and the conduct of business by private entities providing probation services as authorized by this article.

(b) The business of the council shall be conducted in the following manner:

(1) The council shall annually elect a chairperson and a vice chairperson from among its membership. The offices of chairperson and vice chairperson shall be filled in such a manner that they are not held in succeeding years by representatives of the same component (law enforcement, courts, corrections) of the criminal justice system;

(2) The council shall meet at such times and places as it shall determine necessary or convenient to perform its duties. The council shall also meet on the call of the chairperson or at the written request of three of its members;

(3) The council shall maintain minutes of its meetings and such other records as it deems necessary; and

(4) The council shall adopt such rules for the transaction of its business as it shall desire and may appoint such committees as it considers necessary to carry out its business and duties.

(c) Members of the council shall serve without compensation but shall receive the same expense allowance per day as that received by a member of the General Assembly for each day such member of the council is in attendance at a meeting of such council, plus either reimbursement for actual transportation costs while traveling by public carrier or the same mileage allowance for use of a personal motor vehicle in connection with such attendance as members of the General Assembly receive. Payment of such expense and travel allowance shall be subject to availability of funds and shall be in lieu of any per diem, allowance, or other remuneration now received by any such member for such attendance.

(d) The council is assigned to the Administrative Office of the Courts for administrative purposes only. The funds necessary to carry out the provi-

sions of this article shall come from funds appropriated to or otherwise available to the council. The council is authorized to accept and use grants of funds for the purpose of carrying out the provisions of this article.

(e) The council shall have the following powers and duties:

(1) To promulgate rules and regulations for the administration of the council, including rules of procedure for its internal management and control;

(2) To review the uniform professional standards for private probation officers and uniform contract standards for private probation contracts established in Code Section 42-8-102 and submit a report with its recommendations to the General Assembly;

(3) To promulgate rules and regulations establishing a 40 hour initial orientation for newly hired private probation officers and for 20 hours per annum of continuing education for private probation officers, provided that the 40 hour initial orientation shall not be required of any person who has successfully completed a probation or parole officer basic course of training certified by the Georgia Peace Officer Standards and Training Council or any private probation officer who has been employed by a private probation corporation, enterprise, or agency for at least six months as of July 1, 1996;

(4) To promulgate rules and regulations relative to the enforcement of the provisions of this article, which enforcement mechanisms may include, but are not limited to, the imposition of sanctions and fines and the voiding of contracts;

(5) To promulgate rules and regulations establishing registration for any private corporation, enterprise, or agency providing probation services under the provisions of this article, subject to the provisions of subsection (a) of Code Section 42-8-107;

(6) To produce an annual summary report. Such report shall not contain information identifying individual private corporations, non-profit corporations, or enterprises or their contracts; and

(7) To promulgate rules and regulations requiring criminal record checks of private probation officers and establishing procedures for such criminal record checks. Such rules and regulations shall require a private probation entity to conduct a criminal history records check, as provided in Code Section 35-3-34, for all private probation officers employed by that entity; and to certify the results of such criminal history records check to the council, in such detail as the council may require. Notwithstanding Code Section 35-3-38 or any other provision of law, a private probation entity shall, upon request, communicate criminal history record information on a private probation officer to the Administrative

Office of the Courts and the County and Municipal Probation Advisory Council.

(f) The initial standards, rules, and regulations of the County and Municipal Probation Advisory Council promulgated under this article shall become effective on January 1, 1996. (Code 1981, § 42-8-101, enacted by Ga. L. 1991, p. 1135, § 2; Ga. L. 1992, p. 3221, § 8; Ga. L. 1995, p. 396, § 2; Ga. L. 1996, p. 1107, §§ 3, 4; Ga. L. 1997, p. 692, § 1.)

**The 1995 amendment** effective April 10, 1995, rewrote this Code section.

**The 1996 amendment**, effective April 15, 1996, inserted "or individual with expertise in private probation services by virtue of his or her training or employment" near the end of the first sentence in subsection (a); and, in subsection (e), inserted "initial" near the beginning and added a comma followed by the proviso in paragraph (3), deleted "and" from the end of paragraph (5), added "; and" at the end of paragraph (6), and added paragraph (7).

**The 1997 amendment**, effective July 1, 1997, substituted "designated by the Council

of Municipal Court Judges of Georgia" for "appointed by the Governor" near the middle of the first sentence in subsection (a).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1992, "The Council" was substituted for "the Council" three times in the first sentence and "of Georgia" was inserted three times in the first sentence.

**Editor's notes.** — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): "No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority."

#### **42-8-102. Uniform professional standards and uniform contract standards.**

(a) The uniform professional standards contained in this subsection shall be met by any person employed as and using the title of a private probation officer. Any such person shall be at least 21 years of age at the time of appointment to the position of private probation officer and must have completed a standard two-year college course; provided, however, that any person who is currently employed as a private probation officer as of July 1, 1996, and who has at least six months of experience as a private probation officer shall be exempt from such college requirements. Every private probation officer shall receive an initial 40 hours of orientation upon employment and shall receive 20 hours of continuing education per annum as approved by the County and Municipal Probation Advisory Council, provided that the 40 hour initial orientation shall not be required of any person who has successfully completed a probation or parole officer basic course of training certified by the Peace Officer Standards and Training Council or any private probation officer who has been employed by a private probation corporation, enterprise, or agency for at least six months as of July 1, 1996. In no event shall any person convicted of a felony be employed as a private probation officer or utilize the title of private probation officer.

(b) The uniform contract standards contained in this Code section shall apply to all private probation contracts executed under the authority of



Code Section 42-8-100. The terms of any such contract shall state, at a minimum:

- (1) The extent of the services to be rendered by the private corporation or enterprise providing probation supervision;
- (2) Any requirements for staff qualifications, to include those contained in this Code section as well as any surpassing those contained in this Code section;
- (3) Requirements for criminal record checks of staff in accordance with the rules and regulations established by the County and Municipal Probation Advisory Council;
- (4) Policies and procedures for the training of staff;
- (5) Bonding of staff and liability insurance coverage;
- (6) Staffing levels and standards for offender supervision, including frequency and type of contacts with offenders;
- (7) Procedures for handling the collection of all court ordered fines, fees, and restitution;
- (8) Procedures for handling indigent offenders to ensure placement of such indigent offenders irrespective of the ability to pay;
- (9) Circumstances under which revocation of an offender's probation may be recommended;
- (10) Reporting and record-keeping requirements; and
- (11) Default and contract termination procedures.

(c) The County and Municipal Probation Advisory Council shall review the uniform professional standards and uniform contract standards contained in subsections (a) and (b) of this Code section and shall submit a report on its findings to the General Assembly. The council shall submit its initial report on or before July 1, 1997, and shall continue such reviews every two years thereafter. Nothing contained in such report shall be considered to authorize or require a change in the standards without action by the General Assembly having the force and effect of law. This report shall provide information which will allow the General Assembly to review the effectiveness of the minimum professional standards and, if necessary, to revise these standards. This subsection shall not be interpreted to prevent the council from making recommendations to the General Assembly prior to its required review and report. (Code 1981, § 42-8-102, enacted by Ga. L. 1992, p. 1465, § 1; Ga. L. 1995, p. 396, § 2; Ga. L. 1996, p. 1107, § 5.)

**The 1995 amendment** effective April 10, 1995, rewrote this Code section.

**The 1996 amendment**, effective April 15, 1996, in subsection (a), added the semicolon

followed by the proviso at the end of the second sentence, added a comma followed by the proviso at the end of the third sentence, and added the fourth sentence.

**Editor's notes.** — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): "No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority."

**42-8-103. Quarterly report to judge and council; records to be open for inspection.**

(a) Any private corporation, enterprise, or agency contracting to provide probation services under the provisions of this article shall provide to the judge with whom the contract was made and the County and Municipal Probation Advisory Council a quarterly report summarizing the number of offenders supervised by the private corporation, enterprise, or agency; the amount of fines, statutory surcharges, and restitution collected; and the number of offenders for whom supervision or rehabilitation has been terminated and the reason for the termination, in such detail as the council may require.

(b) All records of any private corporation, enterprise, or agency contracting to provide services under the provisions of this article shall be open to inspection upon the request of the affected county, municipality, consolidated government, court, the Department of Audits and Accounts, or the County and Municipal Probation Advisory Council. (Code 1981, § 42-8-103, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 1997, p. 692, § 2.)

**Effective date.** — This Code section became effective April 10, 1995.

**The 1997 amendment,** effective July 1, 1997, added ", in such detail as the council may require" at the end of subsection (a); and, in subsection (b), substituted "court," for "or court or" and added ", or the County and Municipal Probation Advisory Council" at the end.

**Editor's notes.** — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): "No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority."

**42-8-104. Conflicts of interests prohibited.**

(a) No private corporation, enterprise, or agency contracting to provide probation services under the provisions of this article nor any employees of such entities shall engage in any other employment, business, or activity which interferes or conflicts with the duties and responsibilities under contracts authorized in this article.

(b) No private corporation, enterprise, or agency contracting to provide probation services under the provisions of this article nor its employees shall have personal or business dealings, including the lending of money, with probationers under their supervision.

(c) (1) No private corporation, enterprise, or agency contracting to provide probation services under the provisions of this article on or after January 1, 1997, nor any employees of such entities, shall own, operate,

have any financial interest in, be an instructor at, or be employed by any private entity which provides drug or alcohol education services or offers a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Human Resources.

(2) No private corporation, enterprise, or agency contracting to provide probation services under the provisions of this article nor any employees of such entities shall specify, directly or indirectly, a particular DUI Alcohol or Drug Use Risk Reduction Program which a probationer may or shall attend. This paragraph shall not prohibit furnishing any probationer, upon request, with the names of certified DUI Alcohol or Drug Use Risk Reduction Programs. Any person violating this paragraph shall be guilty of a misdemeanor. (Code 1981, § 42-8-104, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 1996, p. 1107, § 6.)

**Effective date.** — This Code section became effective April 10, 1995.

**The 1996 amendment,** effective April 15, 1996, added subsection (c).

**Editor's notes.** — Ga. L. 1995, p. 396, § 4,

not codified by the General Assembly, provides in subsection (b): "No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority."

#### **42-8-105. Local government authority not affected.**

The provisions of this article shall not affect the ability of local governments to enter into intergovernmental agreements for probation services. (Code 1981, § 42-8-105, enacted by Ga. L. 1995, p. 396, § 2.)

**Effective date.** — This Code section became effective April 10, 1995.

**Editor's notes.** — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, pro-

vides in subsection (b): "No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority."

#### **42-8-106. Confidentiality of records.**

(a) All reports, files, records, and papers of whatever kind relative to the supervision of probationers by a private corporation, enterprise, or agency contracting under the provisions of this article are declared to be confidential and shall be available only to the affected county, municipality, or consolidated government, the judge handling a particular case, the Department of Audits and Accounts, or the County and Municipal Probation Advisory Council.

(b) In the event of a transfer of the supervision of a probationer from a private corporation, enterprise, or agency to the Department of Corrections, the Department of Corrections shall have access to any relevant reports, files, records, and papers of the transferring private entity. All reports, files, records, and papers of whatever kind relative to the supervision of probationers by private corporations, enterprises, or agencies under



contracts authorized by this article shall not be subject to process of subpoena. (Code 1981, § 42-8-106, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 1997, p. 692, § 3.)

**Effective date.** — This Code section became effective April 10, 1995.

**The 1997 amendment,** effective July 1, 1997, in subsection (a), deleted “or” following “a particular case,” and added “, or the County and Municipal Probation Advisory Council” at the end of that subsection.

**Editor’s notes.** — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): “No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority.”

#### **42-8-107. Registration with council.**

(a) All private corporations, enterprises, and agencies contracting or offering to contract for probation services shall register with the County and Municipal Probation Advisory Council before entering into any contract to provide services. The information included in such registration shall include the name of the corporation, enterprise, or agency, its principal business address and telephone number, the name of its agent for communication, and other information in such detail as the council may require. No registration fee shall be required.

(b) Any corporation, enterprise, or agency required to register under the provisions of subsection (a) of this Code section who fails or refuses to do so shall be subject to revocation of any existing contracts, in addition to any other fines or sanctions imposed by the County and Municipal Probation Advisory Council. (Code 1981, § 42-8-107, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 1997, p. 692, § 4.)

**Effective date.** — This Code section became effective April 10, 1995.

**The 1997 amendment,** effective July 1, 1997, in subsection (a), added “before entering into any contract to provide services” at the end of the first sentence, and, in the second sentence, substituted “include the name” for “be limited to the name”, deleted “and” following “telephone number,” and substituted “, and other information in

such detail as the council may require” for “with the County and Municipal Probation Advisory Council”.

**Editor’s notes.** — Ga. L. 1995, p. 396, § 4, not codified by the General Assembly, provides in subsection (b): “No local funds shall be used to implement Sections 1 and 2 of this Act without the consent of the local governing authority.”

#### **42-8-108. Applicability of article to contractors for probation services; requirements for corporations, enterprises and agencies entering into written contracts for services.**

The probation providers standards contained in this Code section shall be met by corporations, enterprises, or agencies who enter into written contracts for probation services under the authority of Code Section 42-8-100 on or after January 1, 1997. Any corporation, enterprise, or agency who fails to meet the standards established in this Code section on or after

January 1, 1997, shall not be eligible to provide probation services in this state. All corporations, enterprises, or agencies who enter into written contracts for probation services under the authority of Code Section 42-8-100 on or after January 1, 1997, shall:

(1) Maintain no less than \$1 million coverage in general liability insurance;

(2) Not own or control any finance business or lending institution which makes loans to probationers under its supervision for the payment of probation fees or fines; and

(3) Employ at least one person who is responsible for the direct supervision of probation officers employed by the corporation, enterprise, or agency and who shall have at least five years' experience in corrections, parole, or probation services; provided, however, that the five-year experience requirement shall not apply to any corporation, enterprise, or agency which is currently engaged in the provision of private probation services in this state on April 15, 1996. (Code 1981, § 42-8-108, enacted by Ga. L. 1996, p. 1107, § 7.)

**Effective date.** — This Code section became effective April 15, 1996.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, "April 15,

1996" was substituted for "the effective date of this Code section" at the end of paragraph (3).

## ARTICLE 7

### IGNITION INTERLOCK DEVICES AS PROBATION CONDITION

**Law reviews.** — For note on 1993 enactment of this article, see 10 Ga. St. U.L. Rev. 169 (1993).

#### **42-8-110. Definitions; applicability; purchase or lease of ignition interlock devices by counties, municipalities, or private entities; costs, fees and deposits.**

(a) As used in this article, the term "ignition interlock device" means a constant monitoring device certified by the commissioner of public safety which prevents a motor vehicle from being started at any time without first determining the equivalent blood alcohol concentration of the operator through the taking of a deep lung breath sample. The system shall be calibrated so that the motor vehicle may not be started if the blood alcohol concentration of the operator, as measured by the device, exceeds 0.02 grams or if the sample is not a sample of human breath.

(b) As used in this article, the term "provider center" means a facility established for the purpose of providing and installing ignition interlock devices when their use is required by or as a result of an order of a court.

(c) Ignition interlock devices for provider centers shall be purchased or leased by counties, municipalities, or private entities pursuant to competitive bidding procedures established by the rules and regulations of the Department of Public Safety.

(d) A provider center shall be authorized to charge the person whose vehicle is to be equipped with an ignition interlock device such installation, deinstallation, and user fees as are approved by the Department of Public Safety. A provider center may also require such person to make a security deposit for the safe return of the ignition interlock device. Payment of any or all of such fees and deposits may be made a condition of probation under this order. (Code 1981, § 42-8-110, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 1997, p. 760, § 26.)

**The 1997 amendment**, effective July 1, 1997, and applicable to offenses committed on or after that date, in subsection (b), deleted "by a county or municipality" following "established" and deleted "of that county or municipality" at the end following "court"; deleted former subsection (c) which read: "This article shall not apply with respect to a court in general if the county or municipality served by the court has not established a provider center. This article shall not apply in any particular case if the relevant provider center does not have available a functioning certified ignition interlock device available for use in that particular case."; redesignated former subsections (d) and (e) as present subsections (c) and (d) respectively; substituted ", municipalities or private entities" for "and municipalities"

in present subsection (c); substituted "A provider center shall be authorized to charge the person whose vehicle is to be equipped with an ignition interlock device such installation, deinstallation, and user fees as are approved by the Department of Public Safety." for "A provider center may charge the person whose vehicle is to be equipped with an ignition interlock device installation and deinstallation fees and rental fees reasonably calculated to compensate the county or municipality for the total direct and indirect costs of operating the provider center." in present subsection (d).

**Editor's notes.** — Ga. L. 1997, p. 760, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Teen-age and Adult Driver Responsibility Act'."

#### OPINIONS OF THE ATTORNEY GENERAL

**Private vendors may not establish provider centers.** — Section 42-8-110 et seq., does not allow municipal or county officials to contract with private vendors for the

establishment of interlock provider centers; rather the applicable governmental unit is required to establish the centers. 1993 Op. Att'y Gen. No. 93-16.

#### **42-8-111. Court ordered installation of ignition interlock devices; notice to Department of Public Safety; fee for driver's license indicating device required.**

(a) In addition to any other provision of probation, upon a conviction of a second charge of violating Code Section 40-6-391 within five years, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, for which a person is granted probation, the court may order that such person not drive a motor vehicle for a period of not less than six months



unless such vehicle is equipped with a functioning, certified ignition interlock device. For the purposes of this subsection, a plea of nolo contendere shall constitute a conviction. Any person who is ordered to obtain and use an ignition interlock device, as a condition of probation, shall complete the DUI Alcohol or Drug Use Risk Reduction Program and submit to the court or probation department a certificate of completion of the DUI Alcohol or Drug Use Risk Reduction Program and certification of installation of a certified ignition interlock device.

(b) Except as otherwise provided in this article, the court may order the installation of a certified ignition interlock device on any vehicle which any person subject to subsection (a) of this Code section owns or operates. Upon a third or subsequent conviction the court shall require installation of a certified ignition interlock device.

(c) If use of an ignition interlock device is ordered, the court shall include in the record of conviction or violation submitted to the Department of Public Safety notice of the requirement for, and the period of the requirement for, the use of a certified ignition interlock device. The records of the Department of Public Safety shall contain a record reflecting mandatory use of such device and the person's driver's license shall contain a notation that the person may only operate a motor vehicle equipped with a functioning, certified ignition interlock device.

(d) Except as provided in Code Section 42-8-112, no provision of this article shall be deemed to reduce any period of driver's license suspension or revocation otherwise imposed by law.

(e) The fee for issuance of any driver's license indicating that use of an ignition interlock device is required shall be \$15.00, except that for habitual violators required to use an ignition interlock device as a condition of a probationary license the fee shall be as prescribed in Code Section 40-5-58. Upon expiration of the period of time for which such person is required to use an ignition interlock device the person may apply for and receive a regular driver's license upon payment of the fee provided for in Code Section 40-5-25. (Code 1981, § 42-8-111, enacted by Ga. L. 1993, p. 568, § 1.)

**42-8-112. Proof of compliance required for reinstatement of certain drivers' licenses and for obtaining probationary license; reporting requirement.**

(a) If the court imposes the use of an ignition interlock device as a condition of probation on a person whose driving privilege is not suspended or revoked, the court shall require the person to provide proof of compliance with such order to the court or the probation officer within 30 days. If the person fails to provide proof of installation within such period, absent a finding by the court of good cause for that failure, which finding

is entered in the court's record, the court shall revoke or terminate the probation.

(b) If the court imposes the use of an ignition interlock device as a condition of probation on a person whose driving privilege is suspended or revoked, the court shall require the person to provide proof of compliance with such order to the court or the probation officer and the Department of Public Safety not later than the date on which such suspension or revocation concludes. If the person fails to provide proof of installation within such period, the department shall not reinstate such person's driver's license and, absent a finding by the court of good cause for that failure, which finding is entered on the court's record, the court shall revoke or terminate the probation. If the person is authorized under Code Section 40-5-63 or 40-5-67.2 to apply for reinstatement of his or her driver's license during the period of suspension, such person shall prior to applying for reinstatement of the license have an ignition interlock device installed and shall maintain such ignition interlock device in his or her vehicle for a period of six months; provided, however, that for a second or subsequent suspension under Code Section 40-5-63 or suspension for a second offense under Code Section 40-5-67.2, after the Department of Public Safety has held the suspended driver's license for a minimum of 30 days, such person may apply for and be issued a six-month ignition interlock permit, provided that such person submits to the department proof of completion of a DUI Alcohol or Drug Use Risk Reduction Program and proof of installation of an ignition interlock device on his or her vehicle. Any driver who is issued an ignition interlock permit prior to the expiration of 120 days after the suspension of the driver's license may operate such vehicle: (1) only to and from a place of employment or to perform the duties of his or her occupation; (2) to receive medical care or to obtain prescription drugs; (3) to attend a school or college at which he or she is enrolled; (4) to attend court ordered driver improvement or driver education or a drug or alcohol program; (5) to attend regularly scheduled meetings or sessions of recognized organizations for persons who have alcohol or drug addiction or abuse problems; or (6) to report to an ignition interlock station. At the expiration of such six-month ignition interlock permit the driver may apply for reinstatement of a regular driver's license upon payment of the fee provided in Code Section 40-5-25. If the person is authorized under Code Section 40-5-58 or under Code Section 40-5-67.2 to obtain a habitual violator's probationary license, such person shall, if such person is a habitual violator as a result of two or more convictions for driving under the influence of alcohol or drugs, install an ignition interlock device as a condition of such probationary license. Failure to show proof of such device shall be grounds for refusal of reinstatement of such license or issuance of such habitual violator's probationary license or the immediate suspension or revocation of such license.

(c) Each person who is required to use an ignition interlock device pursuant to this article shall report to the provider center every 30 days for

the purpose of monitoring the operation of each interlocking ignition device in the person's vehicle or vehicles. If at any time it is determined that a person has tampered with the device, the Department of Public Safety or the court ordering use of such device shall be given written notice within five days. If an ignition interlock device is found to be malfunctioning, it shall be replaced or repaired, as ordered by the court or the Department of Public Safety, at the expense of the provider. (Code 1981, § 42-8-112, enacted by Ga. L. 1993, p. 568, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, in subsection (b), "suspension, such" was substituted for "suspension such" in the third sentence

and, in the fourth sentence, "court ordered" was substituted for "court-ordered" and "six-month" was substituted for "six month."

#### OPINIONS OF THE ATTORNEY GENERAL

**Condition required for refusal of reinstatement.** — The Department of Public Safety is required to deny reinstatement of a driver's license or issuance of a probationary license for failure to provide proof of the installation of an ignition interlock device

only when the installation has been imposed as a condition of probation by a court in a county or municipality which has established a provider center. 1995 Op. Att'y Gen. No. 95-28.

#### **42-8-113. Renting, leasing, or lending motor vehicle to probationer subject to this article prohibited.**

(a) No person shall knowingly rent, lease, or lend a motor vehicle to a person known to have had his or her driving privilege restricted as a condition of probation as provided in this article, unless the vehicle is equipped with a functioning, certified ignition interlock device. Any person whose driving privilege is restricted as a condition of probation as provided in this article shall notify any other person who rents, leases, or loans a motor vehicle to him or her of such driving restriction.

(b) Any person convicted of a violation of subsection (a) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 42-8-113, enacted by Ga. L. 1993, p. 568, § 1.)

#### **42-8-114. Exception where probationer required to operate motor vehicle owned by employer.**

(a) Notwithstanding Code Sections 42-8-110 through 42-8-113, if a person who is required to use an ignition interlock device pursuant to this article is required to operate a motor vehicle in the course and scope of his or her employment and if the vehicle is owned by the employer, the person may operate that vehicle without installation of an approved ignition interlock device if the employer has been notified by the person that the person's driving privilege has been restricted under this article and if the



person has proof of that notification in his or her possession or the notice, or a facsimile copy thereof, is with the vehicle.

(b) A motor vehicle owned by a business entity, which business entity is all or partly owned or controlled by a person otherwise subject to this article, is not a motor vehicle owned by the employer subject to the exemption in subsection (a) of this Code section. (Code 1981, § 42-8-114, enacted by Ga. L. 1993, p. 568, § 1.)

#### **42-8-115. Certification of ignition interlock devices.**

(a) The commissioner of public safety or the commissioner's designee shall certify ignition interlock devices required by this article and the providers of such devices and shall promulgate rules and regulations for the certification of said devices and providers and the procurement of said devices by counties and municipalities. The standards for certification of such devices shall include, but not be limited to, the following:

- (1) The device shall not impede the safe operation of the vehicle;
- (2) The device shall have features that make circumvention difficult but do not interfere with the normal use of the vehicle;
- (3) The device shall correlate well with established measures of alcohol impairment;
- (4) The device shall work accurately and reliably in an unsupervised environment;
- (5) The device shall resist tampering and give evidence if tampering is attempted;
- (6) The device shall be difficult to circumvent and shall require premeditation to do so;
- (7) The device shall require a deep lung breath sample as a measure of blood alcohol concentration equivalence;
- (8) The device shall operate reliably over the range of automobile environments;
- (9) The device shall have the ability to record and retain the results of all tests;
- (10) The device shall be manufactured by a party who will provide liability insurance; and
- (11) The device shall be backed by a company that can provide a focal point of responsibility for the maintenance and service of such device.

(b) The commissioner of public safety may utilize information from an independent agency to certify ignition interlock devices on or off the

premises of the manufacturer in accordance with rules and regulations promulgated pursuant to this article. The cost of certification shall be borne by the manufacturers of ignition interlock devices.

(c) The commissioner of public safety shall adopt rules and regulations for determining the accuracy of and proper use of the ignition interlock devices in full compliance with this article. No model of ignition interlock device shall be certified unless it meets the accuracy requirements specified by such rules and regulations.

(d) Before certifying any device, the Department of Public Safety shall consult with the National Highway Traffic Safety Administration regarding the use of ignition interlock devices. (Code 1981, § 42-8-115, enacted by Ga. L. 1993, p. 568, § 1.)

#### **42-8-116. Warning labels.**

The providers certified by the Department of Public Safety shall design and adopt pursuant to regulations of the department a warning label which shall be affixed to each ignition interlock device upon installation. The label shall contain a warning that any person tampering, circumventing, or otherwise misusing the device is guilty of a misdemeanor and may be subject to civil liability. (Code 1981, § 42-8-116, enacted by Ga. L. 1993, p. 568, § 1.)

#### **42-8-117. Revocation of driving privilege upon violation of probation imposed by Code Section 42-8-111.**

(a) In the event the sentencing court or the Department of Public Safety finds that a person has violated the terms of probation imposed pursuant to subsection (a) of Code Section 42-8-111, the Department of Public Safety shall revoke that person's driving privilege for one year from the date the court revokes that person's probation. The court shall report such probation revocation to the Department of Public Safety by court order.

(b) In the event the sentencing court or the Department of Public Safety finds that a person has twice violated the terms of probation imposed pursuant to subsection (a) of Code Section 42-8-111 during the same period of probation, the Department of Public Safety shall revoke that person's driving privilege for five years from the date the court revokes that person's probation for a second time. The court shall report such probation revocation to the Department of Public Safety by court order. (Code 1981, § 42-8-117, enacted by Ga. L. 1993, p. 568, § 1.)

#### **42-8-118. Requesting or soliciting another to blow into device; tampering with or circumventing operation of device.**

(a) It is unlawful for any person whose driving privilege is restricted pursuant to subsection (a) of Code Section 42-8-111 to request or solicit any

other person to blow into an ignition interlock device or to start a motor vehicle equipped with the device for the purpose of providing the person so restricted with an operable motor vehicle.

(b) It is unlawful for any person to blow into an ignition interlock device or to start a motor vehicle equipped with the device for the purpose of providing an operable motor vehicle to a person whose driving privilege is restricted pursuant to subsection (a) of Code Section 42-8-111.

(c) It is unlawful to tamper with, or circumvent the operation of, an ignition interlock device.

(d) Any person violating any provision of this Code section shall be guilty of a misdemeanor. (Code 1981, § 42-8-118, enacted by Ga. L. 1993, p. 568, § 1.)

## ARTICLE 8

### DIVERSION CENTER AND PROGRAM

**Effective date.** — This article became effective July 1, 1996.

#### **42-8-130. Establishment; obligations of respondent; confinement; fee; alternative methods of incarceration.**

A county shall be authorized to establish a diversion center under the direction of the sheriff of the county in which the diversion center is located and a diversion program for the confinement of certain persons who have been found in contempt of court for violation of orders granting temporary or permanent alimony or child support and sentenced pursuant to subsection (c) of Code Section 15-1-4. While in such diversion program, the respondent shall be authorized to travel to and from his or her place of employment and to continue his or her occupation. The official in charge of the diversion program or his or her designee shall prescribe the routes, manner of travel, and periods of travel to be used by the respondent in attending to his or her occupation. If the respondent's occupation requires the respondent to travel away from his or her place of employment, the amount and conditions of such travel shall be approved by the official in charge of the diversion center or his or her designee. When the respondent is not traveling to or from his or her place of employment or engaging in his or her occupation, such person shall be confined in the diversion center during the term of the sentence. With the approval of the sheriff or his or her designee, the respondent may participate in educational or counseling programs offered at the diversion center. While participating in the diversion program, the respondent shall be liable for alimony or child support as previously ordered, including arrears, and his or her income shall be subject to the provisions of Code Sections 19-6-30 through 19-6-33 and Chapter 11 of Title 19. In addition, should any funds remain after



payment of child support or alimony, the respondent may be charged and a fee payable to the county operating the diversion program to cover the costs of his or her incarceration and the administration of the diversion program which fee shall be not more than \$30.00 per day or the actual per diem cost of maintaining the respondent, whichever is less, for the entire period of time the person is confined to the center and participating in the program. If the respondent fails to comply with any of the requirements imposed upon him or her in accordance with this Code section, nothing shall prevent the sentencing judge from revoking said assignment to a diversion program and providing for alternative methods of incarceration. (Code 1981, § 42-8-130, enacted by Ga. L. 1996, p. 649, § 3.)



Sec.		Sec.	
42-9-49.	Reimbursement of counties for incarceration of persons arrested in accordance with Code Section 42-9-48.		political disabilities; conditional pardons prohibited.
42-9-50.	Preliminary hearing for parole or conditional release violator; ratification or overruling of decision of hearing officer by board; disposition of violator.	42-9-55.	Cooperation by jails or correctional institutions with board.
42-9-51.	Final hearing for parole or conditional release violator; order and statement as to disposition of violator; revocations without hearing and temporary revocations.	42-9-56.	Restriction on Governor's powers.
42-9-52.	Discharge from parole; earned-time allowance; granting of pardons, commutations, and remissions of fines, forfeitures, or penalties.	42-9-57.	Effect of chapter on probation power of courts; cooperation by board with local agencies.
42-9-53.	Preservation of documents; classification of information and documents; divulgence of confidential state secrets; conduct of hearings.	42-9-58.	Effect of chapter on other laws respecting parole and probation.
42-9-54.	Effect of pardons upon civil and	42-9-59.	Effect of chapter on previously granted pardons, paroles, and probations.
		42-9-60.	Overcrowding of prison system as creating state of emergency; paroling inmates to reduce prison system population to capacity; annual report of inmates paroled.

Article 3

Uniform Act for Out-of-State Parolee Supervision

42-9-70.	Short title.
42-9-71.	Execution and text of compact.

ARTICLE 1

GENERAL PROVISIONS

42-9-1. Declaration of legislative policy.

In recognition of the doctrine contained in the Constitution of this state requiring the three branches of government to be separate, it is declared to be the policy of the General Assembly that the duties, powers, and functions of the State Board of Pardons and Paroles are executive in character and that, in the performance of its duties under this chapter, no other body is authorized to usurp or substitute its functions for the functions imposed by this chapter upon the board. (Ga. L. 1953, Nov.-Dec. Sess., p. 210, § 2; Ga. L. 1985, p. 149, § 42.)

**Cross references.** — Composition and powers of State Board of Pardons and Paroles, Ga. Const. 1983, Art. IV, Sec. II, Paras. I, II.

JUDICIAL DECISIONS

**Parole conditions.** — The trial court erred by requiring defendant to waive his Fourth Amendment right as a condition of parole, since "any attempt by a court to impose its will over the Executive Department by attempting to impose as a part of a criminal sentence conditions operating as a prerequisite of or becoming automatically effective in



the event of a subsequent parole of defendant by the State Board of Pardons and Parole would be a nullity and constitute an

exercise of power granted exclusively to the Executive." *Stephens v. State*, 207 Ga. App. 645, 428 S.E.2d 661 (1993).

### OPINIONS OF THE ATTORNEY GENERAL

**Suspension of sentence upon prisoner's parole by another state.** — Where a prisoner is incarcerated in another state and is serving that state and this state's sentences concurrently, a provision for suspension of this

state's sentence in the event of parole by the other state authorities does not usurp functions of the State Board of Pardons and Paroles. 1974 Op. Att'y Gen. No. 74-147.

### RESEARCH REFERENCES

**C.J.S.** — 73 C.J.S., Public Administrative Law and Procedure, § 10, 11.

#### 42-9-2. Creation of board; composition; administration; advisory capacity.

(a) Pursuant to Article IV, Section II, Paragraph I of the Georgia Constitution, there shall be a State Board of Pardons and Paroles, which shall consist of five members appointed by the Governor, subject to confirmation of the Senate.

(b) The board is assigned to the Department of Corrections for administrative purposes only, as prescribed in Code Section 50-4-3.

(c) The members of the board shall serve ex officio in an advisory capacity to the Board of Corrections. (Ga. L. 1943, p. 185, § 1; Ga. L. 1972, p. 1069, § 12; Ga. L. 1973, p. 157, § 1; Ga. L. 1983, p. 500, § 2; Ga. L. 1985, p. 283, § 1.)

**Cross references.** — Composition, terms, and appointment of members of State Board of Pardons and Paroles, Ga. Const. 1983, Art. IV, Sec. II, Para. I.

**Editor's notes.** — Section 1 of Ga. L. 1983,

p. 500, not codified by the General Assembly, provides as follows: "It is the intent of this Act to implement certain changes required by Article IV, Section II of the Constitution of the State of Georgia."

### JUDICIAL DECISIONS

**Qualifications of members.** — This article, enumerating powers and duties of the board does not make provision for, or reference to, qualifications of members of the board at the time of their appointment. The qualifications of members of the board would, therefore, be controlled by the general provisions of the Constitution and statutory laws limiting the rights of citizens to hold public office. *McLendon v. Everett*, 205 Ga. 713, 55 S.E.2d 119 (1949).

**Presumption of compliance with law.** —

While board may change its rules, there is presumption of law that members, being public officers, will discharge their duties and follow the provisions of this article which created the board. *Thompson v. State*, 203 Ga. 416, 47 S.E.2d 54 (1948).

**Forfeiture of office.** — There is nothing in this article, defining powers and duties of members of State Board of Pardons and Paroles, which provides that doing certain acts by member would operate as forfeiture of his office. *Turner v. Wilburn*, 206 Ga. 149,

56 S.E.2d 285 (1949). But see §§ 42-9-12 and 42-9-13 for provisions regarding incapacity, etc.

There being no statutory provision that a member of the State Board of Pardons and Paroles should forfeit his office if he engaged in any other business or profession, or held any public office, during his service upon the board, quo warranto is not the

proper remedy to determine whether or not there has been an act of forfeiture. *Turner v. Wilburn*, 206 Ga. 149, 56 S.E.2d 285 (1949). But see §§ 42-9-12 and 42-9-13 for provisions regarding incapacity, etc.

**Cited in** *Todd v. State*, 75 Ga. App. 711, 44 S.E.2d 275 (1947); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

### OPINIONS OF THE ATTORNEY GENERAL

**Control in board, not individuals.** — Management and control is vested in State Board of Pardons and Paroles and not in individual members, or in any one individual officer. In the absence of a statutory provision to the contrary, where official authority is conferred upon the board or commission composed of three or more persons, such authority may be exercised by a majority of the members of the board, but it may not be exercised by a single member of such a board, or by a minority. 1945-47 Op. Att'y Gen. p. 450.

**Function of chairman of board.** — Chairman of the board is the proper parliamentary officer to preside at meetings of the board, for the purpose of directing or regulating proceedings and seeing that meetings or hearings are conducted in an orderly manner. The chairman of the board, however, by virtue of such office or of his title, does not acquire authority to perform the powers and duties vested by the General

Assembly in the State Board of Pardons and Paroles. 1945-47 Op. Att'y Gen. p. 450.

**Board's quasi-judicial functions retained.** — Except for supervision of parolees and assignment to the Department of Offender Rehabilitation (Corrections) for administrative purposes only, the State Board of Pardons and Paroles retains its quasi-judicial functions and powers as a result of the Executive Reorganization Act of 1972 (Ga. L. 1972, p. 1015). 1975 Op. Att'y Gen. No. 75-72.

**Assignment of staff by Department of Offender Rehabilitation (Corrections) to board.** — Since the State Board of Pardons and Paroles has statutory authority to hire its own personnel to assist in carrying out its quasi-judicial functions, the Department of Offender Rehabilitation (Corrections) is not authorized to assign staff to the board as preparole investigators. 1975 Op. Att'y Gen. No. 75-35.

### RESEARCH REFERENCES

**ALR.** — Statute conferring power upon administrative body in respect to the parole of prisoners, or the discharge of parolees, as

unconstitutional infringement of power of executive or judiciary, 143 ALR 1486.

#### 42-9-3. "Board" defined.

As used in this chapter, the term "board" means the State Board of Pardons and Paroles.

#### 42-9-4. Appointments to board when Senate not in session.

Appointments made at times when the Senate is not in session shall be effective ad interim. (Ga. L. 1973, p. 157, § 2.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 63A Am. Jur. 2d, Public Officers and Employees, §§ 135, 137. **C.J.S.** — 67 C.J.S., Officers, §§ 76-79.

**42-9-5. Compensation of board members.**

The members of the board shall devote their full time to the duties of their office. The salaries, travel expenses, and costs of lodging and meals of the members of the board shall be paid as provided in Code Sections 45-7-4 and 45-7-20. (Ga. L. 1943, p. 185, § 3; Ga. L. 1947, p. 673, § 2; Ga. L. 1952, p. 6, § 1; Ga. L. 1989, p. 14, § 42.)

## JUDICIAL DECISIONS

**Engaging in another profession.** — This section does not include any qualification of membership or any penalty by forfeiture of office for engaging in another business or profession. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).

## OPINIONS OF THE ATTORNEY GENERAL

**Per diem defined.** — The words “per diem” are commonly used to cover an allowance for expenses of officials or agents while they are upon official or proper business away from their regular headquarters or base. 1948-49 Op. Att’y Gen. p. 415.

**The purpose of the General Assembly in passing this article** was to provide, in addition to the salary paid the board members, a subsistence allowance of a certain amount per month, plus transportation fare and per diem if travel is made by railroad or bus, or

the regular mileage fee when private car is used in the performance of official duties. Hence the board members are entitled to receive the monthly subsistence plus transportation and per diem. 1948-49 Op. Att’y Gen. p. 415.

**Members of State Board of Pardons and Paroles may receive subsistence** payment each month and may receive expenses for lodging and meals incurred while traveling upon official business. 1948-49 Op. Att’y Gen. p. 415.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 63A Am. Jur. 2d, Public Officers and Employees, §§ 431-434, 448-453, 461. **C.J.S.** — 67 C.J.S., Officers, §§ 219, 223-227.

**42-9-6. Board chairman.**

(a) Each year the board shall elect one of its members to serve as chairman of the board for the ensuing year.

(b) The chairman shall draw no salary from the state in addition to that which he receives as a member of the board. (Ga. L. 1943, p. 185, § 4; Ga. L. 1983, p. 500, § 3; Ga. L. 1984, p. 689, § 1.)



**Cross references.** — Manner of selection of chairman of board, Ga. Const. 1983, Art. IV, Sec. II, Para. I.

**Editor's notes.** — Section 1 of Ga. L. 1983, p. 500, not codified by the General Assembly,

provides as follows: "It is the intent of this Act to implement certain changes required by Article IV, Section II of the Constitution of the State of Georgia."

### JUDICIAL DECISIONS

**Liability for invidious discrimination.** — The doctrine of qualified immunity does not shield defendants Chairman of the Board of Pardons and Paroles and Parole Decisions Guidelines employee from liability for plaintiff's equal protection claim. When making a

parole decision, members of a parole board may not engage in invidious discrimination based on race, religion, national origin, poverty, or some other constitutionally protected interest. *Parisie v. Morris*, 873 F. Supp. 1560 (N.D. Ga. 1995).

### OPINIONS OF THE ATTORNEY GENERAL

**Purpose and function of chairmanship of board.** — The creation of a chairmanship of the State Board of Pardons and Paroles was for the convenience of the board, in that the board is privileged to expect and to call upon such member for the performance of duties or services not calling for the action

of the board or delegated by the General Assembly to others; the board has the right to determine such duties and to provide how, and in what manner, the particular administrative acts shall be performed. 1945-47 Op. Att'y Gen. p. 450.

#### 42-9-7. Board quorum.

A majority of the board shall constitute a quorum for the transaction of all business except as otherwise provided in this chapter. (Ga. L. 1943, p. 185, § 6.)

### OPINIONS OF THE ATTORNEY GENERAL

**A quorum of two members of the State Board of Pardons and Paroles** must be present in order to grant a reprieve to an inmate; further, the law provides that two

members of the board must concur in order to grant an inmate a reprieve. 1972 Op. Att'y Gen. No. 72-6.

#### 42-9-8. Official board seal.

The board shall adopt an official seal of which the courts shall take judicial notice. (Ga. L. 1943, p. 185, § 5.)

#### 42-9-9. Board employees.

The board may appoint such clerical, stenographic, supervisory, and expert assistants and may establish such qualifications for its employees as it deems necessary. In its discretion, the board may discharge such employees. (Ga. L. 1943, p. 185, § 9.)

### OPINIONS OF THE ATTORNEY GENERAL

**Board may hire and discharge employees** — required in the performance of its quasi-judicial functions. 1975 Op. Att'y Gen. No. 75-35.

**Assignment of staff by department to board not required.** — Since the board has

statutory authority to hire its own personnel to assist in carrying out its quasi-judicial functions, the Department of Offender Rehabilitation (Corrections) is not authorized to assign staff to the board as preparole investigators. 1975 Op. Att'y Gen. No. 75-35.

#### 42-9-10. Legal adviser of board.

The Attorney General shall be the legal adviser of the board. (Ga. L. 1943, p. 185, § 7.)

#### 42-9-11. Office quarters for board; supplies and equipment.

The board shall have office quarters in the state capital. Supplies, stationery, and equipment shall be provided for the board in the same manner as they are provided for other departments, boards, commissions, bureaus, or offices of the state. (Ga. L. 1943, p. 185, § 8.)

#### 42-9-12. Appointment of replacement for incapacitated member; calling of appointing council by Governor; immunity of council from civil or criminal liability.

(a) Whenever the Governor has personal knowledge or receives information deemed by him to be reliable that any member of the board, by reason of illness or other providential cause, is unable to perform the duties of his office, he shall call a council to be composed of the president of the Medical Association of Georgia, the president of the State Bar of Georgia, and the commissioner of human resources for the purpose of ascertaining whether or not any member of the board is in fact unable to perform the duties of his office. In the event the president of the Medical Association of Georgia is disqualified or unable for any cause to serve on the council, he shall appoint some other member of the Medical Association of Georgia, preferably an elected officer therein, to serve in his place and stead; and he shall notify the Governor of his appointee. In the event the president of the State Bar of Georgia is disqualified or unable for any cause to serve on the council, he shall appoint some other member of the State Bar of Georgia, preferably an elected officer therein, to serve in his place and stead; and he shall notify the Governor of his appointee. In the event the commissioner of human resources is disqualified or unable for any cause to serve on the council, the chairman of the Board of Human Resources, if he is a physician licensed to practice under Chapter 34 of Title 43, shall serve in place of the commissioner. If both the commissioner and the chairman are disqualified or unable for any cause to serve on the council, the chairman shall designate a member of the Board of Human Resources who is a physician

licensed to practice under Chapter 34 of Title 43 to serve on the council. The chairman shall notify the Governor of his appointee.

(b) The Governor shall inform the council, appointed pursuant to subsection (a) of this Code section, of the information which has caused him to believe that a member of the board is unable to perform the duties of his office. If the council or a majority thereof, after a full investigation and examination into the truth of such information, shall, in writing duly signed, find that a member is incapacitated to perform the duties of his office, the Governor shall execute an executive order relating such facts. The member shall thereupon be suspended from performing the duties of his office and the Governor shall appoint a person to perform the duties of such member of the board during his incapacity.

(c) The person appointed to perform the duties of a member of the board shall give bond with good security as required of other members of the board, shall be given the same oath of office as other members of the board, and shall be issued a commission as a member of the board, which shall be effective so long as the person performs the duties of a member of the board. Upon giving the bond and taking the oath as required by this Code section, and upon being issued his commission as authorized in this Code section, the person shall be authorized to do everything, perform every act, and exercise every prerogative and discretion that any other member of the board might do, perform, or exercise under existing law.

(d) The person appointed to serve as a member of the board in the place and stead of an incapacitated member shall be subject to the confirmation of the Senate, if the Senate is in session at the time of his appointment or convenes in session prior to the expiration of his appointment. Any such appointment made at times when the Senate is not in session shall be effective ad interim.

(e) During the period of incapacity of a member of the board, the member shall be entitled to receive the compensation and such other benefits as may be provided by law or otherwise for members of the board.

(f) Notwithstanding any other law to the contrary, the appointee may be an elected official, appointed official, or employee of this state. The order appointing the person to serve in the place and stead of any incapacitated member shall include his compensation. The compensation to be received by such person shall not exceed the compensation received by other members of the board.

(g) No member of the council designated pursuant to this Code section shall be civilly or criminally liable for his actions and doings as a member of the council. This provision may be pleaded as an absolute defense in any civil or criminal proceedings relative thereto. (Code 1933, § 77-502.1, enacted by Ga. L. 1970, p. 729, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1989, p. 14, § 42.)



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 63 Am. Jur. 2d, Public Officers and Employees, §§ 289-295.      **C.J.S.** — 67 C.J.S., Officers, §§ 76-79, 108-113.

**42-9-13. Reinstatement of incapacitated member upon recovery.**

(a) Whenever the Governor has personal knowledge or receives information deemed by him to be reliable that a member of the board who has been determined to be incapacitated to perform the duties of his office has overcome his incapacity, that his incapacity has been removed, or that his incapacity has ceased, the Governor shall call the council that previously examined the member of the board who was found to be incapacitated to perform the duties of his office or shall call a council comprised of the persons set forth in Code Section 42-9-12. Whenever the council has knowledge or receives information deemed by the members to be reliable that the member of the board who has been determined to be incapacitated to perform the duties of his office has overcome his incapacity, that his incapacity has been removed, or that his incapacity has ceased, the members may call themselves into session for the purpose of ascertaining whether or not the member of the board is in fact able to resume the performance of the duties of his office.

(b) If the Governor calls the council, he shall inform the council of the information that has caused him to believe that the person is able to resume the performance of the duties of his office. If the council or a majority thereof, after full investigation and examination into the truth of the information furnished by the Governor or otherwise given to the council, shall, in writing duly signed, find that the incapacity of the member has ceased and that the member is capable of assuming the performance of the duties of his office, the Governor shall execute an executive order relating such facts. The member shall thereafter assume and perform the duties of his office and the term of the member of the board appointed to perform the duties of the previously incapacitated member shall terminate. (Code 1933, § 77-502.2, enacted by Ga. L. 1970, p. 729, § 1.)

## RESEARCH REFERENCES

**C.J.S.** — 67 C.J.S., Officers, §§ 114-116.

**42-9-14. Removal of board members for cause.**

(a) As used in this Code section, the term "committee" or "removal committee" means the Governor, Lieutenant Governor, and an appointee of the Governor who is not the Attorney General.

(b) The removal committee is authorized to promulgate rules and regulations pertaining to the removal for cause of members of the board.

(c) Rules and regulations promulgated by the committee may include, but are not restricted to, the procedures to be observed in removing members of the board for cause and determinations as to what conduct by a board member shall be cause for removal.

(d) The removal committee is not an agency within the meaning of paragraph (1) of Code Section 50-13-2, and Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," shall not be applicable to the removal committee. (Ga. L. 1973, p. 727, §§ 1-4; Ga. L. 1983, p. 500, § 4; Ga. L. 1988, p. 426, § 1.)

**Editor's notes.** — Section 1 of Ga. L. 1983, p. 500, not codified by the General Assembly, provides as follows: "It is the intent of this

Act to implement certain changes required by Article IV, Section II of the Constitution of the State of Georgia."

#### RESEARCH REFERENCES

**C.J.S.** — 73 C.J.S., Administrative Law and Procedure, § 87 et seq.

#### 42-9-15. Conflicts of interest by members or employees of board.

(a) Except as provided in subsections (b) and (c) of this Code section, no member of the board or full-time employee thereof, during his or her service upon or under the board, shall engage in any other business or profession or hold any other public office which business, profession, or office conflicts with his or her official duties as a member of the board or as an employee thereof; nor shall he or she serve as a representative of any political party or any executive committee or other governing body thereof, or as an executive officer or employee of any political committee, organization, or association; nor shall he or she be engaged on the behalf of any candidate for public office in the solicitation of votes or otherwise become a candidate for public office, without resigning from the board or from employment by the board.

(b) Except as provided by subsection (c) of this Code section, an employee of the board shall not be required to resign from employment by the board if he or she becomes a candidate for a public office of a county, school district, or municipality which does not require full-time service or accepts appointment to such an office.

(c) An employee of the board shall be required to resign from employment by the board if he or she becomes a candidate for the General Assembly or becomes a candidate for or accepts appointment to a public office which requires full-time service. (Ga. L. 1943, p. 185, § 10; Ga. L. 1997, p. 556, § 1.)

**The 1997 amendment**, effective July 1, 1997, designated the existing provisions as

subsection (a); in subsection (a), substituted "Except as provided in subsections (b) and

(c) of this Code section, no" for "No" at the beginning, inserted "or her" preceding "service", inserted "which business, profession, or office conflicts with his or her offi-

cial duties as a member of the board or as an employee thereof" near the middle, and inserted "or she" in two places; and added subsections (b) and (c).

### JUDICIAL DECISIONS

**Political party membership.** — If being a member of the Democratic executive committee made the defendant the holder of an "office" at the time of his appointment as a member of the State Board of Pardons and Paroles, he would not thereby forfeit his appointment as a member of such board. *McLendon v. Everett*, 205 Ga. 713, 55 S.E.2d 119 (1949).

**Section does not provide any penalty for violation.** — It does not declare that, if a member of the board shall serve as a representative of a political party, or engage in any other business or profession, he shall thereby forfeit his office. The General Assembly might have provided that a member of the Democratic executive committee could not be appointed as a member of the board, and might have declared a member of the committee to be ineligible for appointment on the board. The legislature did not do this. They provided that a member of the board should not serve as an executive officer or employee of any political committee. *McLendon v. Everett*, 205 Ga. 713, 55 S.E.2d 119 (1949); *McLendon v. Wilburn*, 206 Ga. 646, 58 S.E.2d 423 (1950).

**Engaging in another profession.** — This section does not include any qualification of membership or any penalty by forfeiture of office for engaging in another business or profession. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).

**Termination not constitutional violation.** — Termination of plaintiff's position as a parole review officer of the board of pardons and paroles after his election to county and state political party committees does not violate his constitutional rights of due process and equal protection or his constitutionally protected rights of political speech and association. *MacKenzie v. Snow*, 675 F. Supp. 1333 (N.D. Ga. 1987).

**No modification by § 45-10-70.** — Section 45-10-70 does not expressly or impliedly repeal this section. It is reasonable for the General Assembly to loosen its limitations on political activity for state employees generally in the first provision, while continuing to prohibit pardon and parole board members and employees from engaging in political activity in the second provision. *MacKenzie v. Snow*, 675 F. Supp. 1333 (N.D. Ga. 1987).

### OPINIONS OF THE ATTORNEY GENERAL

**No modification by § 45-10-70.** — Section 45-10-70 does not repeal, supersede, or otherwise modify this section as it applies to the political activities of a full-time employee of the State Board of Pardons and Paroles since § 45-10-70 only prohibits the promulgation of rules and regulations affecting an employee's ability to engage in certain political activity. 1987 Op. Att'y Gen. No. 87-16.

**Violation as basis for disciplinary action under rules.** — Violation of the Merit System rules governing political activity or violation of this section by a classified employee can be used as a valid basis for disciplinary action (including dismissal) or forfeiture of the position under the rules. 1987 Op. Att'y Gen. No. 87-16.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 63A Am. Jur. 2d, Public Officers and Employees, §§ 36, 37, 39, 40, 64-66, 68-71, 77.



**42-9-16. Persons permitted to appear or practice before board for remuneration generally.**

(a) Only duly licensed attorneys who are active members in good standing of the State Bar of Georgia shall be permitted to appear or practice in any matter before the board for a fee, money, or other remuneration.

(b) Any person who pays or receives any fee, money, or other remuneration in violation of subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1968, p. 1193, § 1.)

**Law reviews.** — For article discussing areas in which attorneys may represent clients

before the State Board of Pardons and Paroles, see 13 Ga. St. B.J. 46 (1976).

**OPINIONS OF THE ATTORNEY GENERAL**

**Correspondence and telephone calls.** — Any appearance or practice in a paid, representative capacity in any matter pending before the board is activity regulated by this section; this is so even if the activity involves contact limited to members of the board's staff. No exceptions or distinctions are made between particular activities undertaken in that capacity; correspondence and telephone calls are as much within the statute as

are personal appearances. 1974 Op. Att'y Gen. No. 74-22.

**Disclosure of fee and profession.** — The board may require a representative to disclose whether a fee is involved and whether he is an attorney; however, the board may not require disclosure of the amount of fee but may seek its voluntary disclosure. 1974 Op. Att'y Gen. No. 74-22.

**42-9-17. Appearance before board by members of General Assembly or other elected or appointed officials on behalf of persons under the jurisdiction of the board.**

(a) It shall be unlawful for members of the General Assembly or any other state elected or appointed official to accept any compensation for appearing before the board in behalf of a person under the jurisdiction of the board and for seeking a decision on behalf of the person. Nothing in this Code section shall be construed so as to prohibit:

(1) Members of the General Assembly or state elected or appointed officials from appearing before the board when their official duties require them to do so; or

(2) Members of the General Assembly or state elected or appointed officials from requesting information from and presenting information to the board on behalf of constituents when no compensation, gift, favor, or anything of value is accepted, either directly or indirectly, for such services.

(b) Nothing in subsection (a) of this Code section shall be construed to apply to the acceptance of compensation, expenses, and allowances received by members of the General Assembly or any other state elected or appointed official for their duties as such members or officials.

(c) Any person who violates subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1974, p. 471, §§ 1-3.)

### OPINIONS OF THE ATTORNEY GENERAL

**Correspondence and telephone calls.** — Any appearance or practice in a paid, representative capacity in any matter pending before the board is activity regulated by this section; this is so even if the activity involves contact limited to members of the board's staff. No exceptions or distinctions are made between particular activities undertaken in that capacity; correspondence and telephone calls are as much within the statute as

are personal appearances. 1974 Op. Att'y Gen. No. 74-22.

**Disclosure of fee and profession.** — The board may require a representative to disclose whether a fee is involved and whether he is an attorney; however, the board may not require disclosure of the amount of the fee but may seek its voluntary disclosure. 1974 Op. Att'y Gen. No. 74-22.

### 42-9-18. Maintenance of records of persons contacting members of board on behalf of inmates.

The board shall maintain a complete written record of every person contacting any member of the board on behalf of an inmate. The record shall be indexed and a copy of the record shall be placed in the inmate's file. The record shall include the name and address of the person contacting the board member and the reason for contacting the board member. (Ga. L. 1968, p. 1193, § 2.)

### 42-9-19. Annual report of board.

On or before January 1 of each year, the board shall make a written report of its activities, copies of which shall be sent to the Governor, the Attorney General, each body of the General Assembly, and to such other officers and persons as the board may deem advisable. One copy of the report shall become a part of the records of the board. (Ga. L. 1943, p. 185, § 24; Ga. L. 1983, p. 500, § 5; Ga. L. 1984, p. 22, § 42; Ga. L. 1984, p. 689, § 2.)

**Editor's notes.** — Section 1 of Ga. L. 1983, p. 500, not codified by the General Assembly, provides as follows: "It is the intent of this

Act to implement certain changes required by Article IV, Section II of the Constitution of the State of Georgia."

### 42-9-20. General duties of board.

In all cases in which the chairman of the board or any other member designated by the board has suspended the execution of a death sentence to enable the full board to consider and pass on same, it shall be mandatory that the board act within a period not exceeding 90 days from the date of the suspension order. In the cases which the board has power to consider, the board shall be charged with the duty of determining which inmates serving sentences imposed by a court of this state may be released on

pardon or parole and fixing the time and conditions thereof. The board shall also be charged with the duty of supervising all persons placed on parole, of determining violations thereof and of taking action with reference thereto, of making such investigations as may be necessary, and of aiding parolees or probationers in securing employment. It shall be the duty of the board personally to study the cases of those inmates whom the board has power to consider so as to determine their ultimate fitness for such relief as the board has power to grant. The board by an affirmative vote of a majority of its members shall have the power to commute a sentence of death to one of life imprisonment. (Ga. L. 1943, p. 185, § 11; Ga. L. 1973, p. 1294, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 1983, p. 500, § 6.)

**Cross references.** — Powers of State Board of Pardons and Paroles, Ga. Const. 1983, Art. IV, Sec. II, Para. II. Authority of Governor to suspend execution of death sentences, Ga. Const. 1983, Art. V, Sec. II, Para. II and § 42-9-56. Imposition and review of death penalty generally, § 17-10-30 et seq.

**Editor's notes.** — Section 1 of Ga. L. 1983, p. 500, not codified by the General Assembly, provides as follows: "It is the intent of this Act to implement certain changes required by Article IV, Section II of the Constitution of the State of Georgia."

## JUDICIAL DECISIONS

**Constitutionality.** — The presence of "unfettered discretion" in the clemency process does not render the imposition of the death penalty on the defendant arbitrary and capricious in violation of the eighth amendment. The discretion involved at the clemency stage can never cause the imposition of the death sentence; it serves only as an act of grace to relieve that sentence even when the sentence has been legally imposed. *Smith v. Snow*, 722 F.2d 630 (11th Cir. 1983).

**One application intended as matter of right.** — It is the intent of the Constitution and this article that consideration and action upon one application for commutation by the board is all that the prisoner may demand as a matter of right. Whether or not a second application would be considered and acted upon by the board would be a matter for the board's discretion. *McLendon v. Everett*, 205 Ga. 713, 55 S.E.2d 119 (1949).

**Instructing jury of possibility of parole of prisoner not erroneous.** — The defendant in a criminal case, upon conviction and after serving his minimum sentence, may be paroled to serve the remainder of his sentence outside the confines of the penitentiary and

the court did not err in so instructing the jury at their request. *Jones v. State*, 88 Ga. App. 330, 76 S.E.2d 810 (1953).

**Denial of parole, as distinguished from revocation of parole,** does not amount to loss of liberty in the due process context. *Jackson v. Reese*, 608 F.2d 159 (5th Cir. 1979).

**Cited in** *Matthews v. Everett*, 201 Ga. 730, 41 S.E.2d 148 (1947); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

**Parole conditions.** — The trial court erred by requiring defendant to waive his Fourth Amendment right as a condition of parole, since "any attempt by a court to impose its will over the Executive Department by attempting to impose as a part of a criminal sentence conditions operating as a prerequisite of or becoming automatically effective in the event of a subsequent parole of defendant by the State Board of Pardons and Parole would be a nullity and constitute an exercise of power granted exclusively to the Executive." *Stephens v. State*, 207 Ga. App. 645, 428 S.E.2d 661 (1993).



## OPINIONS OF THE ATTORNEY GENERAL

**Release prior to serving maximum sentence.** — If the prisoner is to be released any time prior to serving his maximum sentence, that duty is one for the State Board of Pardons and Paroles. 1948-49 Op. Att'y Gen. p. 611.

**The constitutional requirement in this section of a majority** to decide action of board requires affirmative vote of three members to commute sentence of death to one of life imprisonment. 1973 Op. Att'y Gen. No. 73-137.

**Confinement in prison system as prerequisite for parole.** — In order to be eligible for parole consideration, a person must be confined in a state penal institution; a person out on bond would not be eligible for parole consideration unless and until he is returned to confinement in the state prison system. 1971 Op. Att'y Gen. No. 71-97.

The board does not have jurisdiction to act upon this state's sentence so long as the individual concerned is incarcerated in a federal prison serving this state's sentence concurrently with a federal sentence; to be eligible for parole consideration, an individual must be confined in a state penal institution. 1972 Op. Att'y Gen. No. 72-35.

**Board may grant conditional release.** — Under Ga. Const. 1983, Art. IV, Sec. II, Para. II, and this article, the board may, if it deems it necessary and proper in the interest of the prisoner and the public, grant to such prisoner a conditional release, providing that such release is conditioned upon the prisoner's remaining in a state hospital and continuing the treatment prescribed by the members of the staff until such time as he has been cured of an illness, or the illness reduced to such point where the physicians deem it prudent and safe for him and the general public that he be dismissed from the hospital. 1954-56 Op. Att'y Gen. p. 504.

**Use of original record of trial.** — The board may not review the original record of trial for purpose of determining guilt or innocence of defendant, but may consider it on the question of clemency. 1945-47 Op. Att'y Gen. p. 443.

**Sentence tolled upon grant of reprieve for receipt of medical treatment.** — Where a

prisoner receives a reprieve of his sentence for the purpose of receiving medical treatment, his sentence does not run during the time he is outside the penitentiary. 1957 Op. Att'y Gen. p. 200.

**Commuting sentence to present service.** — The board does have power to commute a sentence of imprisonment to present service upon condition that the prisoner pay a fine in the sum fixed within the law by the board, or upon such other conditions which are not illegal, immoral, or impossible of performance. 1945-47 Op. Att'y Gen. p. 446.

**Reprieve defined.** — A reprieve is the withdrawing of any sentence for an interval of time; it does no more than stay the execution of the sentence for a period of time. It is the withdrawing of a sentence for an interval of time whereby the execution of the sentence is suspended; it is merely the postponement of the execution of a sentence; it does not and cannot defeat the ultimate execution of the judgment of the court but merely delays it; it is a respite, a temporary suspension of the execution of a sentence; it is a delay. 1957 Op. Att'y Gen. p. 200.

**Advisement by attorney general as to whether conviction authorized.** — Attorney General may not advise the board whether a conviction was authorized by the evidence submitted at trial. 1945-47 Op. Att'y Gen. p. 442.

**Computation of parole eligibility.** — It is proper to compute parole eligibility of one serving consecutive sentences under state and county control on the same basis as a single sentence equal in duration to the total time of the consecutive sentences. 1973 Op. Att'y Gen. No. 73-109.

**Pardon for traffic offense.** — Notwithstanding fact that an individual has been pardoned for a traffic offense, he is not entitled to have his driver's license reinstated, because, the right to operate motor vehicle, to practice profession and other extraordinary rights granted and regulated by the state under its police power are not affected by pardon. 1954-56 Op. Att'y Gen. p. 506.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59 Am. Jur. 2d, Pardon and Parole, §§ 1, 2, 6-12, 17, 21-23, 26-31, 33, 35, 45-48, 73, 75-78, 93.

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 3-12, 30-33, 35-42.

**ALR.** — Judicial investigation of pardon by Governor, 30 ALR 238; 65 ALR 1471.

Power to pardon or commute sentence as one which devolves upon the Lieutenant Governor during the absence or disability of the Governor, 32 ALR 1162.

Consent of convict as essential to a pardon, commutation or reprieve, 52 ALR 835.

Statute conferring power upon administrative body in respect to the parole of prisoners, or the discharge of parolees, as unconstitutional infringement of power of executive or judiciary, 143 ALR 1486.

Offenses and convictions covered by pardon, 35 ALR2d 1261.

Pardon as restoring public office or license or eligibility therefor, 58 ALR3d 1191.

#### **42-9-20.1. Public access to information regarding paroled felons residing within state.**

Notwithstanding the provisions of Article 4 of Chapter 18 of Title 50 or any provisions of this chapter relating to the confidentiality of records, the State Board of Pardons and Paroles shall develop and implement a system whereby any interested citizen of this state shall be permitted to contact the board through an electronic calling system or by other means and receive information relating to persons who have been convicted of a felony, who have been paroled, and whose current addresses are within the State of Georgia. With respect to each parolee, the board shall provide the parolee's name, sex, date of birth, current address, crime or crimes for which the parolee was convicted, and the beginning and ending dates of such person's parole. The board shall not release any information regarding a person who has previously been paroled and whose civil rights have been restored. The board shall be authorized to charge a reasonable fee to cover the costs of providing such information. The board shall be authorized to promulgate rules and regulations to carry out the provisions of this Code section. (Code 1981, § 42-9-20.1, enacted by Ga. L. 1997, p. 915, § 1.)

**Effective date.** — This Code section became effective July 1, 1997.

#### **42-9-21. Supervision of persons placed on parole or other conditional release; contracts for services and programs; collection of sums for restitution.**

(a) The board shall have the function and responsibility of supervising all persons placed on parole or other conditional release by the board.

(b) The board is authorized to maintain and operate or to enter into memoranda of agreement or other written documents evidencing contracts with other state agencies, persons, or nonsectarian entities for transitional or intermediate or other services or for programs deemed by the board to be necessary for parolees or others conditionally released from imprisonment by order of the board.

(c) In all cases where restitution is applicable, the board shall collect during the parole period those sums determined to be owed to the victim. (Ga. L. 1977, p. 1209, § 1; Ga. L. 1992, p. 3221, § 9; Ga. L. 1996, p. 1097, § 1.)

**The 1996 amendment**, effective July 1, 1996, inserted "maintain and operate or to" and "transitional or intermediate or other" and deleted the comma following "entities" in subsection (b).

#### **42-9-21.1. Compensation of board employee injured by inmate or parolee.**

Repealed by Ga. L. 1986, p. 1491, § 3, effective July 1, 1986.

**Editor's notes.** — This Code section was based on Ga. L. 1985, p. 1113, § 2. For current provisions regarding compensation of board employees injured in the line of duty by an act of external violence, see Code Section 45-7-9.

#### **42-9-22. Construction of chapter.**

This chapter shall be liberally construed so that its purpose may be achieved. (Ga. L. 1943, p. 185, § 28.)

### **ARTICLE 2**

#### **GRANTS OF PARDONS, PAROLES, AND OTHER RELIEF**

**Cross references.** — Authority of judge in fixing sentence to specify that offender may be considered for parole prior to completion of any minimum requirement otherwise imposed by law relating to completion of service of specified time before parole eligibility, § 17-10-1. Restrictions on granting of parole to person convicted of fourth felony offense, § 17-10-7.

**Administrative rules and regulations.** — Pardons and paroles, Official Compilation of Rules and Regulations of State of Georgia, Rules of State Board of Pardons and Paroles, Chapters 475-1 through 475-3.

#### **42-9-39. Restrictions on relief for person serving a second life sentence.**

(a) The provisions of this Code section shall be binding upon the board in granting pardons and paroles, notwithstanding any other provisions of this article or any other law relating to the powers of the board.

(b) Except as otherwise provided in subsection (b) of Code Section 17-10-7, when a person is convicted of murder and sentenced to life imprisonment and such person has previously been incarcerated under a life sentence, such person shall serve at least 25 years in the penitentiary before being granted a pardon and before becoming eligible for parole.

(c) When a person receives consecutive life sentences as the result of offenses occurring in the same series of acts and any one of the life sentences is imposed for the crime of murder, such person shall serve consecutive ten-year periods for each such sentence, up to a maximum of 30 years, before being eligible for parole consideration.



(d) Any other provisions of this Code section to the contrary notwithstanding, the board shall have the authority to pardon any person convicted of a crime who is subsequently determined to be innocent of said crime. (Code 1981, § 42-9-39, enacted by Ga. L. 1983, p. 523, § 1; Ga. L. 1994, p. 1959, § 14.)

**Cross references.** — Power and authority of the board to grant reprieves, pardons, paroles, and other relief, Ga. Const. 1983, Art. IV, Sec. II, Para. II.

**Editor's notes.** — Ga. L. 1994, p. 1959, § 18, not codified by the General Assembly, provides: "This Act shall become effective on January 1, 1995, upon ratification by the voters of this state at the 1994 November general election of that proposed amendment to Article IV, Section II, Paragraph II of the Constitution authorizing the General Assembly to provide for mandatory minimum sentences and sentences of life without possibility of parole in certain cases and providing restrictions on the authority of the State Board of Pardons and Paroles to grant paroles." That amendment was ratified by the voters on November 8, 1994, so this Code section, as set out above, became effective on January 1, 1995.

Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Sentence Reform Act of 1994.'"

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: "The General Assembly declares and finds:

"(1) That persons who are convicted of certain serious violent felonies shall serve

minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

"(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections."

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: "The provisions of this Act shall apply only to those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a 'conviction' for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act."

Ga. L. 1994, p. 1959, § 17, not codified by the General Assembly, provides for severability.

**Law reviews.** — For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 159 (1994).

## JUDICIAL DECISIONS

**Denial of parole not necessarily cruel and unusual punishment.** — Since in pleading guilty to four counts of murder and one count of aggravated assault, defendant admitted a number of acts that a jury could reasonably consider "aggravating circumstances" under § 17-10-30(b), and in both Georgia and other jurisdictions, he might well have been sentenced to death, a sentence denying him consideration of parole

for 30 years, under subsection (c) does not constitute "cruel and unusual punishment." *McClendon v. State*, 256 Ga. 480, 350 S.E.2d 235 (1986).

**Cited in** *Cook v. State*, 255 Ga. 565, 340 S.E.2d 843 (1986); *Davis v. State*, 255 Ga. 598, 340 S.E.2d 869 (1986); *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986); *In re L.L.B.*, 256 Ga. 768, 353 S.E.2d 507 (1987).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59 Am. Jur. 2d, Pardon and Parole, §§ 31, 78.

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 8-10, 41-48.

**42-9-40. Parole guidelines system.**

(a) The board shall adopt, implement, and maintain a parole guidelines system for determining parole action. The guidelines system shall be used in determining parole actions on all inmates, except those serving life sentences, who will become statutorily eligible for parole consideration. The system shall be consistent with the board's primary goal of protecting society and shall take into consideration the severity of the current offense, the inmate's prior criminal history, the inmate's conduct, and the social factors which the board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision.

(b) The guidelines system required by subsection (a) of this Code section shall be adopted by rules or regulations of the board. The rules or regulations shall be adopted in conformity with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Ga. L. 1980, p. 404, § 1.)

**Law reviews.** — For article critically analyzing the adoption of determinate-based sentencing, see 17 Ga. L. Rev. 425 (1983).

## JUDICIAL DECISIONS

**Release is not mandated.** — Section 42-9-42(c) must be read as a qualification of this section, the provision requiring adoption of the parole guideline system. Although the legislature has required the Board of Pardon and Paroles to adopt a guideline system to be used as a framework for making more consistent parole decisions, it also preserved the Board's authority to use its discretion in making final parole decisions. The statute and regulations, therefore, do not mandate that release be granted if the guidelines criteria is met. *Sultenfuss v.*

*Snow*, 35 F.3d 1494 (11th Cir. 1994), cert. denied, U.S. , 115 S. Ct. 1254, 131 L. Ed. 2d 134 (1995).

**Mandamus not available to compel change in parole date.** — Setting of a tentative parole month was a discretionary act of the state parole board and mandamus did not lie to compel the board to reinstate a former tentative date. *Vargas v. Morris*, 266 Ga. 141, 465 S.E.2d 275 (1996), cert. denied, U.S. , 116 S. Ct. 1329, 134 L. Ed. 2d 480 (1996).

## RESEARCH REFERENCES

**ALR.** — Validity of statutes prohibiting or restricting parole, probation, or suspension

of sentence in cases of violent crimes, 100 ALR3d 431.

**42-9-41. Duty of board to obtain and place in records information respecting persons subject to relief or placed on probation; investigations; rules.**

(a) It shall be the duty of the board to obtain and place in its permanent records information as complete as may be practicable on every person who may become subject to any relief which may be within the power of the board to grant. The information shall be obtained as soon as possible after imposition of the sentence and shall include:

(1) A complete statement of the crime for which the person is sentenced, the circumstances of the crime, and the nature of the person's sentence;

(2) The court in which the person was sentenced;

(3) The term of his sentence;

(4) The name of the presiding judge, the prosecuting officers, the investigating officers, and the attorney for the person convicted;

(5) A copy of presentence investigation and any previous court record;

(6) A fingerprint record;

(7) A copy of all probation reports which may have been made; and

(8) Any social, physical, mental, or criminal record of the person.

(b) The board in its discretion may also obtain and place in its permanent records similar information on each person who may be placed on probation. The board shall immediately examine such records and any other records obtained and make such other investigation as it may deem necessary. It shall be the duty of the court and of all probation officers and other appropriate officers to furnish to the board, upon its request, such information as may be in their possession or under their control. The Department of Human Resources and all other state, county, and city agencies, all sheriffs and their deputies, and all peace officers shall cooperate with the board and shall aid and assist it in the performance of its duties. The board may make such rules as to the privacy or privilege of such information and as to its use by persons other than the board and its staff as may be deemed expedient in the performance of its duties. (Ga. L. 1943, p. 185, § 12.)

### JUDICIAL DECISIONS

**Right to parole.** — The Georgia parole statutes create no entitlement to or liberty interest in parole. *Slocum v. Georgia State Bd. of Pardons & Paroles*, 678 F.2d 940 (11th Cir.), cert. denied, 459 U.S. 1043, 103 S. Ct. 462, 74 L. Ed. 2d 612 (1982).

**Examination of file by inmate.** — The refusal of a parole board to allow an inmate to examine his file does not assume the proportions of a deprivation of his rights under the Constitution or the laws of the United States. *Slocum v. Georgia State Bd. of*



Pardons & Paroles, 678 F.2d 940 (11th Cir.), cert. denied, 459 U.S. 1043, 103 S. Ct. 462, 74 L. Ed. 2d 612 (1982).

### OPINIONS OF THE ATTORNEY GENERAL

**Maintenance of misdemeanor records mandatory.** — A misdemeanor may become subject to parole upon application; therefore, the board must maintain all information gathered on such an individual in its "permanent" records. 1963-65 Op. Att'y Gen. p. 318.

### RESEARCH REFERENCES

**C.J.S.** — 67A C.J.S., Pardon and Parole, § 34.

#### **42-9-42. Procedure for granting relief from sentence; conditions and prerequisites; violation of parole.**

(a) No person shall be granted clemency, pardon, parole, or other relief from sentence except by a majority vote of the board. A majority of the members of the board may commute a death sentence to life imprisonment, as provided in Code Section 42-9-20.

(b) A grant of clemency, pardon, parole, or other relief from sentence shall be rendered only by a written decision which shall be signed by at least the number of board members required for the relief granted and which shall become a part of the permanent record.

(c) Good conduct, achievement of a fifth-grade level or higher on standardized reading tests, and efficient performance of duties by an inmate shall be considered by the board in his favor and shall merit consideration of an application for pardon or parole. No inmate shall be placed on parole until and unless the board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and the welfare of society. Furthermore, no person shall be released on pardon or placed on parole unless and until the board is satisfied that he will be suitably employed in self-sustaining employment or that he will not become a public charge. However, notwithstanding other provisions of this chapter, the board may, in its discretion, grant pardon or parole to any aged or disabled persons.

(d) (1) Any person who is paroled shall be released on such terms and conditions as the board shall prescribe. The board shall diligently see that no peonage is allowed in the guise of parole relationship or supervision. The parolee shall remain in the legal custody of the board until the expiration of the maximum term specified in his sentence or until he is pardoned by the board.

(2) The board may require the payment of a parole supervision fee of at least \$10.00 per month as a condition of parole or other conditional release. The monthly amount shall be set by rule of the board and shall be uniform state wide. The board may require or the parolee or person under conditional release may request that up to 24 months of the supervision fee be paid in advance of the time to be spent on parole or conditional release. In such cases, any advance payments are nonreimbursable in the event of parole or conditional release revocation or if parole or conditional release is otherwise terminated prior to the expiration of the sentence being served on parole or conditional release. Such fees shall be collected by the board to be paid into the general fund of the state treasury.

(e) If a parolee violates the terms of his parole, he shall be subject to rearrest or extradition for placement in the actual custody of the board, to be redelivered to any state or county correctional institution of this state. (Ga. L. 1943, p. 185, § 13; Ga. L. 1974, p. 474, § 1; Ga. L. 1975, p. 795, § 1; Ga. L. 1984, p. 775, § 1; Ga. L. 1985, p. 414, § 1; Ga. L. 1986, p. 1596, § 3.)

**Cross references.** — Power of board to order adult offender to make restitution to victim as condition of any relief ordered, § 17-14-3. Power of board to grant parole

prior to completion of one-third of sentence if restitution to victim is ordered as condition of parole, § 17-14-4.

### JUDICIAL DECISIONS

**Section constitutional.** — The presence of "unfettered discretion" in the clemency process does not render the imposition of the death penalty on the defendant arbitrary and capricious in violation of the eighth amendment. The discretion involved at the clemency stage can never cause the imposition of the death sentence; it serves only as an act of grace to relieve that sentence even when the sentence has been legally imposed. *Smith v. Snow*, 722 F.2d 630 (11th Cir. 1983).

**Instruction to jury.** — The defendant in a criminal case, upon conviction and after serving his minimum sentence, may be paroled to serve the remainder of his sentence outside the confines of the penitentiary and the court did not err in so instructing the jury at their request. *Jones v. State*, 88 Ga. App. 330, 76 S.E.2d 810 (1953).

**State cannot be required to explain its reasons for parole decision** when it is not required to act on prescribed grounds. *Georgia State Bd. of Pardons & Paroles v. Turner*, 248 Ga. 767, 285 S.E.2d 731 (1982).

**Board control until expiration of maximum term.** — This section gives the board

control over the prisoner until expiration of his maximum term and power to revoke a parole and remand a parolee into custody to serve the maximum of his sentence. *Balkcom v. Sellers*, 219 Ga. 662, 135 S.E.2d 414 (1964).

**No liberty interest in parole.** — The current Georgia parole system, as reflected in this section, does not require the board to grant parole based upon the presence or absence of specified findings and, as a result, does not give rise to a liberty interest. Accordingly, because plaintiff had no liberty interest in parole, his right to procedural due process could not have been violated and summary judgment on his claim was appropriate. *Greene v. Georgia Pardons & Parole Bd.*, 807 F. Supp. 748 (N.D. Ga. 1992).

Paragraph (c) must be read as a qualification of § 42-9-40, the provision requiring adoption of the parole guideline system. Although the legislature has required the Board of Pardon and Paroles to adopt a guideline system to be used as a framework for making more consistent parole deci-

sions, it also preserved the Board's authority to use its discretion in making final parole decisions. The statute and regulations, therefore, do not mandate that release be granted if the guidelines criteria is met. *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994), cert. denied, U.S. , 115 S. Ct. 1254, 131 L. Ed. 2d 134 (1995).

**Cited in** *Matthews v. Everett*, 201 Ga. 730, 41 S.E.2d 148 (1947); *Balkcom v. Jackson*,

219 Ga. 59, 131 S.E.2d 551 (1963); *Woodall v. State*, 122 Ga. App. 653, 178 S.E.2d 337 (1970); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Houser v. Morris*, 518 F. Supp. 873 (N.D. Ga. 1981); *Shafer v. Crockett*, 160 Ga. App. 419, 287 S.E.2d 358 (1981); *Slocum v. Georgia State Bd. of Pardons & Paroles*, 678 F.2d 940 (11th Cir. 1982).

## OPINIONS OF THE ATTORNEY GENERAL

**Jurisdiction of state probation system.** — A defendant may come under jurisdiction of the state probation system in only one of two ways: (1) where the court elects to place him in the custody of the state probation system; or (2) where the board elects to release a prisoner on "probation." 1972 Op. Att'y Gen. No. 72-21.

**Adult and youthful offenders treated alike.** — The rules and regulations of the board do not distinguish between youthful and adult offenders in setting forth those circumstances and criteria which determine when offenders will be considered for parole. Those offenders who were sentenced in the superior court, but committed to the Division for Children and Youth until their seventeenth birthday, are to be treated as all other offenders sentenced in the superior court on felony charges, for purposes of parole consideration. 1980 Op. Att'y Gen. No. 80-142.

**Parolee remains under supervision of prison authorities.** — This section and § 42-9-52, construed together, mean that a paroled prisoner while serving sentence out-

side confines of prison continues to serve same under supervision of prison authorities. 1945-47 Op. Att'y Gen. p. 441.

**Reimbursement for medical care provided to parolees.** — A person to whom a prisoner suffering from tuberculosis has been paroled, should be reimbursed for providing proper medical care. 1945-47 Op. Att'y Gen. p. 441.

**Authority to collect payments of fines and restitution.** — The collection and disbursement of payments of fines and restitution as may be established as conditions upon the grant of parole may be undertaken by probation supervisors employed by the Department of Offender Rehabilitation (Corrections) so long as such payments are specifically required by court order as the result of a criminal proceeding. 1984 Op. Att'y Gen. No. 84-50.

**Payment of fines and restitution during parole.** — The State Board of Pardons and Paroles may, as a condition of parole, order parolees to commence court imposed payments such as fines and restitution while on parole. 1984 Op. Att'y Gen. No. 84-50.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59 Am. Jur. 2d, Pardon and Parole, §§ 80, 84, 93, 96-98, 101.

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 11, 34, 42, 47, 48, 55, 56.

**ALR.** — Formal requisites of pardon, 34 ALR 212.

Constitutionality of statute prescribing course of conduct for discharged convict, 38 ALR 1036.

Consent of convict as essential to a pardon, commutation or reprieve, 52 ALR 835.

Conditional pardon, 60 ALR 1410.

Extradition of escaped or paroled convict, or one at liberty on bail, 78 ALR 419.

Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed, 35 ALR2d 769.

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon, 58 ALR3d 1156.

When is a person in custody of governmental authorities for purpose of exercise of



state remedy of habeas corpus — modern cases, 26 ALR4th 455.

#### **42-9-42.1. Use of HIV test results in granting relief from sentence; conditions.**

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) The board is authorized to obtain from any penal institution, with at least 60 days prior notice to that institution, and any such penal institution is authorized to provide the board with HIV test results regarding any person who applies or is eligible for clemency, a pardon, a parole, or other relief from a sentence or to require such person to submit to an HIV test and to consider the results of any such test in determining whether to grant clemency, a pardon, a parole, or other relief to such person. Test results obtained pursuant to the authority of this Code section may not be the sole basis for determining whether to grant or deny any such relief to such person, however. The board is further authorized to impose conditions upon any person to whom the board grants clemency, a pardon, a parole, or other relief and who is determined by an HIV test to be infected with HIV, which conditions may include without being limited to those designed to prevent the spread of HIV by that person. (Code 1981, § 42-9-42.1, enacted by Ga. L. 1988, p. 1799, § 10.)

**Editor's notes.** — Ga. L. 1988, p. 1799, § 1, not codified by the General Assembly, provides: "The General Assembly finds that Acquired Immunodeficiency Syndrome (AIDS) and its causative agent, including Human Immunodeficiency Virus (HIV), pose a grave threat to the health, safety, and welfare of the people of this state. In the absence of any effective vaccination or treatment for this disease, it threatens almost certain death to all who contract it. The disease is largely transmitted through sexual contacts and intravenous drug use, not through casual contact, and, while deadly, is therefore preventable. The key component of the fight against AIDS is education. Through public education and counseling

our citizens can learn how the disease is transmitted and, thus, how to protect themselves and prevent its spread. The Department of Human Resources is encouraged to continue its efforts to educate all Georgians about the disease, its causative agent, and its means of transmission. In addition, voluntary testing should be encouraged for anyone who feels at risk of infection. While education, counseling, and voluntary testing are vital to the elimination of this epidemic, other measures are needed to protect the health of our citizens, and it is the intention of the General Assembly to enact such measures in the exercise of its police powers in order to deal with AIDS and HIV infection."

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59 Am. Jur. 2d, Pardon and Parole, §§ 21, 79.

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 11, 48.

**42-9-43. Information to be considered by board generally; conduct of investigation and examination; determination as to grant of relief.**

(a) The board, in considering any case within its power, shall cause to be brought before it all pertinent information on the person in question. Included therein shall be:

(1) A report by the superintendent, warden, or jailer of the jail or state or county correctional institution in which the person has been confined upon the conduct of record of the person while in such jail or state or county correctional institution;

(2) The results of such physical and mental examinations as may have been made of the person;

(3) The extent to which the person appears to have responded to the efforts made to improve his social attitude;

(4) The industrial record of the person while confined, the nature of his occupations while so confined, and a recommendation as to the kind of work he is best fitted to perform and at which he is most likely to succeed when and if he is released; and

(5) The educational programs in which the person has participated and the level of education which the person has attained based on standardized reading tests.

The board may also make such other investigation as it may deem necessary in order to be fully informed about the person.

(b) Before releasing any person on parole, the board may have the person appear before it and may personally examine him. Thereafter, upon consideration, the board shall make its findings and determine whether or not the person shall be granted a pardon, parole, or other relief within the power of the board; and the board shall determine the terms and conditions thereof. Notice of the determination shall be given to the person and to the correctional official having him in custody.

(c) If a person is granted a pardon or a parole, the correctional officials having the person in custody, upon notification thereof, shall inform him of the terms and conditions thereof and shall, in strict accordance therewith, release the person. (Ga. L. 1943, p. 185, § 14; Ga. L. 1986, p. 1596, § 4.)

**Cross references.** — Power of board to order adult offender to make restitution to victim as condition of any relief ordered, § 17-14-3. Power of board to grant parole

prior to completion of one-third of sentence if restitution of victim is ordered as condition of parole, § 17-14-4.

## JUDICIAL DECISIONS

**This section allows, but does not require, an interview.** *Williams v. McCall*, 531 F.2d 1247 (5th Cir. 1976).

**Board members immune from damage suits.** — The members of the board in passing on and processing applications for parole exercise discretion imposed upon

them by law. They are immune from suits for damages for such governmental functions. *Neal v. McCall*, 134 Ga. App. 680, 215 S.E.2d 537 (1975).

**Cited in** *Slocum v. Georgia State Bd. of Pardons & Paroles*, 678 F.2d 940 (11th Cir. 1982).

## OPINIONS OF THE ATTORNEY GENERAL

**The board may make investigations as deemed necessary so as to be fully informed about persons seeking parole.** 1973 Op. Att'y Gen. No. 73-22.

**Access to hospital "discharge summaries."** — The board should be given access to "discharge summaries" from Central State Hospital on inmates being considered for parole; such disclosure would not be a breach of confidentiality. 1973 Op. Att'y Gen. No. 73-54.

**Stipulation in order revoking conditional pardon.** — The board, in revoking a conditional pardon of a parolee who was convicted of burglary committed while on parole, may stipulate in the order of revocation that the balance of the original sentence be served consecutively with the new sentence. 1952-53 Op. Att'y Gen. p. 388.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59 Am. Jur. 2d, Pardon and Parole, §§ 21, 79.

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 11, 45-48.

**ALR.** — Consent of convict as essential to a pardon, commutation or reprieve, 52 ALR 835.

**Right to credit on state sentence for time served under sentence of court of separate jurisdiction where state fails to specify in that regard,** 90 ALR3d 408.

**42-9-44. Specification of terms and conditions of parole; adoption of general and special rules; violation of parole; certain parolees to obtain high school diploma or General Educational Development equivalency diploma (GED).**

(a) The board, upon placing a person on parole, shall specify in writing the terms and conditions thereof. A certified copy of the conditions shall be given to the parolee. Thereafter, a copy shall be sent to the clerk of the court in which the person was convicted. The board shall adopt general rules concerning the terms and conditions of parole and concerning what shall constitute a violation thereof and shall make special rules to govern particular cases. The rules, both general and special, may include, among other things, a requirement that the parolee shall not leave this state or any definite area in this state without the consent of the board; that the parolee shall contribute to the support of his or her dependents to the best of the parolee's ability; that the parolee shall make reparation or restitution for his or her crime; that the parolee shall abandon evil associates and ways; and



that the parolee shall carry out the instructions of his or her parole supervisor, and, in general, so comport himself or herself as the parolee's supervisor shall determine. A violation of the terms of parole may render the parolee liable to arrest and a return to a penal institution to serve out the term for which the parolee was sentenced.

(b) Each parolee who does not have a high school diploma or a general educational development equivalency diploma (GED) shall be required as a condition of parole to obtain a high school diploma or general educational development equivalency diploma (GED) or to pursue a trade at a vocational or technical school. Any such parolee who demonstrates to the satisfaction of the board an existing ability or skill which does in fact actually furnish the parolee a reliable, regular, and sufficient income shall not be subject to this provision. Any parolee who is determined by the Department of Corrections or the board to be incapable of completing such requirements shall only be required to attempt to improve their basic educational skills. Failure of any parolee subject to this requirement to attend the necessary schools or courses or to make reasonable progress toward fulfillment of such requirement shall be grounds for revocation of parole. The board shall establish regulations regarding reasonable progress as required by this subsection. This subsection shall apply to paroles granted on or after July 1, 1995. (Ga. L. 1943, p. 185, § 15; Ga. L. 1995, p. 625, § 2.)

**The 1995 amendment**, effective July 1, 1995, designated the existing provisions of this Code section as subsection (a), and, in that subsection, substituted "the parolee" for "he" and "the parolee's" for "his" throughout, and inserted "or her" in three places and "or herself" in the fourth sentence; and added subsection (b).

**Cross references.** — Requirement of res-

titution by criminal offender as condition of relief generally, § 17-14-3. Granting by State Board of Pardons and Paroles of parole conditioned on restitution prior to completion of one-third of sentence, § 17-14-4.

**Law reviews.** — For note on the 1995 amendment of this section, see 12 Ga. St. U.L. Rev. 301 (1995).

## JUDICIAL DECISIONS

**Board control over prisoner.** — This section and § 42-9-42 give the board control over the prisoner until expiration of his maximum term and the power to revoke a parole and remand a parolee into custody to serve the maximum term of his sentence. *Balkcom v. Sellers*, 219 Ga. 662, 135 S.E.2d 414 (1964).

Where, after a prisoner has served the minimum term provided in a felony sentence, the board releases a prisoner under

certain conditions and permits him to serve the remainder of his maximum sentence outside of prison, and the prisoner violates the conditions imposed, the board may revoke the release and return him to the penitentiary to serve the remainder of his maximum sentence. *Cridler v. Balkcom*, 204 Ga. 480, 50 S.E.2d 321 (1948) (decided under former Code 1933, § 27-2502 (see § 17-10-1)).

## OPINIONS OF THE ATTORNEY GENERAL

**Stipulation in order revoking conditional pardon.** — The board, in revoking a condi-

tional pardon of a parolee who was convicted of burglary committed while on pa-

role, may stipulate in the order of revocation that the balance of the original sentence be served consecutively with the new sentence. 1952-53 Op. Att'y Gen. p. 388.

**Authority to collect payments of fines and restitution.** — The collection and disbursement of payments of fines and restitution as may be established as conditions upon the grant of parole may be undertaken by probation supervisors employed by the Department of Offender Rehabilitation (Correc-

tions) so long as such payments are specifically required by court order as the result of a criminal proceeding. 1984 Op. Att'y Gen. No. 84-50.

**Payment of fines and restitution during parole.** — The State Board of Pardons and Paroles may, as a condition of parole, order parolees to commence court imposed payments such as fines and restitution while on parole. 1984 Op. Att'y Gen. No. 84-50.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59 Am. Jur. 2d, Pardon and Parole, §§ 80, 84, 93, 96-101.

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 17, 54-56.

**ALR.** — Parole as suspending running of sentence, 28 ALR 947.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation, 29 ALR2d 1074.

Ability to pay as necessary consideration in

conditioning probation or suspended sentence upon reparation or restitution, 73 ALR3d 1240.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus — modern cases, 26 ALR4th 455.

Propriety, in criminal case, of Federal District Court order restricting defendant's right to re-enter or stay in United States, 94 ALR Fed. 619.

#### **42-9-44.1. Sexual offenders; conditions for parole; information and notice of name, address, crime.**

(a) As used in this Code section, the term "sexual offense" means a violation of Code Section 16-6-1, 16-6-2, 16-6-5.1, 16-6-22, or 16-6-22.2 when the victim was under 18 years of age at the time of the commission of the offense or a violation of Code Section 16-6-3, 16-6-4, or 16-6-5 when the victim was under 14 years of age (now 16) at the time of the commission of the offense.

(b) (1) The board shall adopt rules providing that with respect to any person who has been convicted of a sexual offense, as a condition of parole, the offender shall be ordered to give notice of his or her name and address, the crime for which he or she was convicted, and the date of parole to:

(A) The superintendent of the public school district where the offender will reside; and

(B) The sheriff of the county wherein the offender will reside.

(2) The offender shall provide the notice and information required in paragraph (1) of this subsection within ten days of the release on parole or within ten days of setting up residency in the locale where the offender plans to have his or her domicile.

(c) Any sex offender who has been paroled and who moves his or her legal residence from one county within this state to another county within this state shall be required to provide the information and notice required in subsection (b) of this Code section with respect to his or her new residence within ten days after moving during the period of his or her parole.

(d) Any person who fails to comply with the requirements of this Code section or who provides false information shall, in the case of a person on parole, be in violation of such person's conditions of parole and shall be guilty of a misdemeanor.

(e) It shall be the duty of the sheriff of each county within this state to maintain a register of the names and addresses of all offenders providing information to the sheriff under this Code section. Such register shall be open to public inspection.

(f) The requirement that a sex offender provide notice and information pursuant to subsections (b) and (c) of this Code section shall terminate upon the offender's satisfactory completion of his or her terms of parole. (Code 1981, § 42-9-44.1, enacted by Ga. L. 1994, p. 791, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1994, "ten days" was substituted for "10 days" in two places in paragraph (2) of subsection (b) and in one place in subsection (c).

**Law reviews.** — For note on the 1994

amendment of this Code section, see 11 Ga. St. U.L. Rev. 226 (1994). For note, "A Modern Day Arthur Dimmesdale: Public Notification When Sex Offenders Are Released into the Community", see 12 Ga. St. U. L. Rev. 1187.

#### **42-9-44.2. Chemical treatment and counseling as condition of parole for child molesters.**

(a) The Board of Pardons and Paroles may in the exercise of its discretion in considering the grant of parole to a person who has been convicted of a second or subsequent offense of child molestation of a child who was 16 years of age or younger at the time of the offense or who has been convicted of a first offense of aggravated child molestation of a child who was 16 years of age or younger at the time of the offense require, as a condition of parole, that such person undergo medroxyprogesterone acetate treatment or its chemical equivalent. While undergoing such treatment, such person must participate in and pay for counseling currently available from a private or public provider of outpatient mental health services. No such treatment shall be administered until such person has consented thereto in writing.

(b) A person who is required to undergo medroxyprogesterone acetate treatment or its chemical equivalent and counseling as a condition of parole shall begin such treatment prior to his or her release from confinement in the state correctional institution or other institution, but additional treat-



ment may continue after such defendant's release on parole until the defendant demonstrates to the board that such treatment is no longer necessary.

(c) The provision of treatment required as a condition of parole shall be administered by the State Board of Pardons and Paroles through licensed medical personnel employed by the defendant and approved by the board. Any physician or qualified mental health professional who acts in good faith in compliance with the provisions of this Code section in the administration of treatment or provision of counseling provided for in this Code section shall be immune from civil or criminal liability for his or her actions in connection with such treatment. The Department of Corrections shall permit access by such licensed medical personnel for such purpose to any person required to begin the treatment and counseling while confined in a facility of the department. The medical personnel utilized or approved by the board shall be required to inform the person about the effect of hormonal chemical treatment and any side effects that may result from it. A person subject to treatment under this Code section shall acknowledge in writing the receipt of this information. (Code 1981, § 42-9-44.2, enacted by Ga. L. 1997, p. 1578, § 2.)

**Effective date.** — This Code section became effective July 1, 1997.

#### **42-9-45. General rule-making power.**

(a) The board may adopt and promulgate rules and regulations, not inconsistent with this chapter, touching all matters dealt with in this chapter, including, among others, the practice and procedure in matters pertaining to paroles, pardons, and remission of fines and forfeitures. The rules and regulations shall contain an eligibility requirement for parole which shall set forth the time when the automatic initial consideration for parole of inmates under the jurisdiction of the Department of Corrections shall take place and also the times at which periodic reconsideration thereafter shall take place. Such consideration shall be automatic, and no written or formal application shall be required.

(b) An inmate serving a misdemeanor sentence or misdemeanor sentences shall only be eligible for consideration for parole after the expiration of six months of his or her sentence or sentences or one-third of the time of his or her sentence or sentences, whichever is greater. Except as otherwise provided in Code Sections 17-10-6.1 and 17-10-7, an inmate serving a felony sentence or felony sentences shall only be eligible for consideration for parole after the expiration of nine months of his or her sentence or one-third of the time of the sentences, whichever is greater. Except as otherwise provided in Code Sections 17-10-6.1 and 17-10-7, inmates serving sentences aggregating 21 years or more shall become

eligible for consideration for parole upon completion of the service of seven years.

(c) The board shall adopt rules and regulations governing the granting of other forms of clemency, which shall include pardons, reprieves, commutation of penalties, removal of disabilities imposed by law, and the remission of any part of a sentence, and shall prescribe the procedure to be followed in applying for them. Applications for the granting of such other forms of clemency and for exceptions to parole eligibility rules established by statute or promulgated by the board shall be made in such manner as the board shall direct by rules and regulations.

(d) All rules and regulations adopted pursuant to this Code section shall be adopted, established, promulgated, amended, repealed, filed, and published in accordance with the applicable provisions and procedure as set forth in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." The courts shall take judicial notice of the rules and regulations.

(e) For the purposes of this Code section, the words "rules and regulations" shall have the same meaning as the word "rule," as defined in Code Section 50-13-2, except that the words "rules and regulations" shall not be construed to include the terms and conditions prescribed by the board to which a person paroled by the board may be subjected.

(f) Except to correct a patent miscarriage of justice and not otherwise, no inmate serving a sentence imposed for any of the crimes listed in this subsection shall be granted release on parole until and unless said inmate has served on good behavior seven years of imprisonment or one-third of the prison term imposed by the sentencing court for the violent crime, whichever first occurs. No inmate serving a sentence for any crime listed in this subsection shall be released on parole for the purpose of regulating jail or prison populations. This subsection shall govern parole actions in sentences imposed for any of the following crimes: voluntary manslaughter, statutory rape, incest, cruelty to children, arson in the first degree, homicide by vehicle while under the influence of alcohol or as a habitual traffic violator, aggravated battery, aggravated assault, trafficking in drugs, and violations of Chapter 14 of Title 16, the "Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act."

(g) No inmate serving a sentence for murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, or aggravated sexual battery shall be released on parole for the purpose of regulating jail or prison populations.

(h) An inmate whose criminal offense or history indicates alcohol or drug involvement shall not be considered for parole until such inmate has successfully completed an Alcohol or Drug Use Risk Reduction Program offered by the Department of Corrections.

(i) An inmate who has committed an offense which has been identified to involve family violence as such term is defined in Code Section 19-13-1

shall not be released on parole until such inmate has successfully completed a Family Violence Counseling Program offered by the Department of Corrections. (Ga. L. 1943, p. 185, § 23; Ga. L. 1964, p. 487, § 1; Ga. L. 1969, p. 948, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 1992, p. 3221, § 10; Ga. L. 1994, p. 1959, § 15; Ga. L. 1995, p. 625, § 3; Ga. L. 1996, p. 1113, § 3.)

**The 1995 amendment**, effective July 1, 1995, added subsection (h).

**The 1996 amendment**, effective July 1, 1996, added subsection (i).

**Cross references.** — Power of board to order adult offender to make restitution to victim as condition of any relief ordered, § 17-14-3. Power of board to grant parole prior to completion of one-third of sentence if restitution to victim is ordered as condition of parole, § 17-14-4.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1995, the subsection originally designated as subsection (g) in the 1995 amendment was redesignated as subsection (h), owing to the fact that this Code section already contained a subsection (g).

**Editor's notes.** — Ga. L. 1994, p. 1959, § 18, not codified by the General Assembly, provides: "This Act shall become effective on January 1, 1995, upon ratification by the voters of this state at the 1994 November general election of that proposed amendment to Article IV, Section II, Paragraph II of the Constitution authorizing the General Assembly to provide for mandatory minimum sentences and sentences of life without possibility of parole in certain cases and providing restrictions on the authority of the State Board of Pardons and Paroles to grant paroles...." That amendment was ratified by the voters on November 8, 1994, so this Code section, as set out above, became effective on January 1, 1995.

Ga. L. 1994, p. 1959, § 1, not codified by the General Assembly, provides: "This Act

shall be known and may be cited as the 'Sentence Reform Act of 1994.'"

Ga. L. 1994, p. 1959, § 2, not codified by the General Assembly, provides: "The General Assembly declares and finds:

"(1) That persons who are convicted of certain serious violent felonies shall serve minimum terms of imprisonment which shall not be suspended, probated, stayed, deferred, or otherwise withheld by the sentencing judge; and

"(2) That sentences ordered by courts in cases of certain serious violent felonies shall be served in their entirety and shall not be reduced by parole or by any earned time, early release, work release, or other such sentence-reducing measures administered by the Department of Corrections."

Ga. L. 1994, p. 1959, § 16, not codified by the General Assembly, provides: "The provisions of this Act shall apply only to those offenses committed on or after the effective date of this Act; provided, however, that any conviction occurring prior to, on, or after the effective date of this Act shall be deemed a 'conviction' for the purposes of this Act and shall be counted in determining the appropriate sentence to be imposed for any offense committed on or after the effective date of this Act."

Ga. L. 1994, p. 1959, § 17, not codified by the General Assembly, provides for severability.

**Law reviews.** — For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 159 (1994).

## JUDICIAL DECISIONS

**Editor's notes.** — Many of the cases noted below were decided prior to the 1994 amendment of this Code section.

**No constitutionally protected interest in parole.** — The exceptional parole process governed by this section and § 42-9-46 did not create a constitutionally protected liberty interest in parole. *Worley v. State Bd. of*

*Pardons & Paroles*, 932 F. Supp. 1466 (N.D. Ga. 1996).

**Consideration of inmate for parole prior to service of minimum time.** — Although subsection (b) purports to establish the minimum time served before an inmate is eligible for consideration for parole, and § 42-9-46 authorizes the Board of Pardons



and Paroles to consider an inmate for parole before the inmate has served the minimum time specified in subsection (b), these provisions can be interpreted as meaning that the board can consider an inmate for parole before service of the minimum time specified in subsection (b), so long as the notice required by § 42-9-46 is given. *Charron v. State Bd. of Pardons & Paroles*, 253 Ga. 274, 319 S.E.2d 453 (1984).

**Retroactive change in the method for calculating the tentative parole month** of certain crime severity level offenders under the parole decision guidelines did not violate the ex post facto clause because the change did not produce a sufficient risk of increasing the measure of punishment attached to the covered crimes. *Jones v. Georgia State*

*Bd. of Pardons & Paroles*, 59 F.3d 1145 (11th Cir. 1995).

Retroactive change in the method for calculating the tentative parole month of certain crime severity level offenders under the parole decision guidelines did not violate due process because the prisoners affected did not have a derivative due process right to be sentenced in reliance on an expectation of parole. *Jones v. Georgia State Bd. of Pardons & Paroles*, 59 F.3d 1145 (11th Cir. 1995).

**Cited in** *Matthews v. Everett*, 201 Ga. 730, 41 S.E.2d 148 (1947); *Williams v. McCall*, 531 F.2d 1247 (5th Cir. 1976); *Slocum v. Georgia State Bd. of Pardons & Paroles*, 678 F.2d 940 (11th Cir. 1982); *Davis v. State*, 255 Ga. 598, 340 S.E.2d 869 (1986).

### OPINIONS OF THE ATTORNEY GENERAL

**Constitutionality of guidelines.** — Insofar as the guidelines of the board serve as a codification of relevant factors which have been and will continue to be considered by the board in making parole decisions, the application of the guidelines to persons already in the state's penal system does not violate the ex post facto clause of Ga. Const. 1983, Art. I, Sec. I, Para. X, or U.S. Const., Art. I, Sec. IX, Para. III. 1979 Op. Att'y Gen. No. 79-74. 501 U.S. 1260, 111 S. Ct. 2915, 115 L. Ed. 2d 1079 (1991), cert. denied.

**Constitutional limitations on power of Board of Pardons and Paroles.** — As of January 1, 1995, there are additional constitutional limitations on the power of the Board of Pardons and Paroles to parole. These limitations are the clear prerogative of the General Assembly to proscribe. They include the inability to parole during the mandatory minimum sentence for the seven serious violent felonies set out in § 17-10-6.1, the inability to parole for sentences of life without parole as set out in §§ 17-10-7(b)(2) and 17-10-16, and the inability to parole for felony recidivists who are convicted for a fourth or subsequent such offense. Other felons and misdemeanants are required to serve the minimum time prescribed in subsection (b) of this section subject to the authority reserved by statute to the board in § 42-9-46 to consider those individuals for clemency upon complying with certain notice procedures. 1995 Op. Att'y Gen. No. 95-4.

**Reinstatement of driver's license.** — Notwithstanding fact that an individual has been pardoned for a traffic offense, he is not entitled to have his driver's license reinstated. The right to operate motor vehicle, to practice profession, and other extraordinary rights granted and regulated by the state under its police power are not affected by pardon. 1954-56 Op. Att'y Gen. p. 506.

**Hearing to consider application for commutation of death sentence.** — Because there appears to be no requirement that the board hold a hearing, public or otherwise, when considering an application for commutation of a death sentence, if the board deems a hearing feasible, it may structure such hearing as it deems practicable in order to facilitate the accomplishment of its duties. 1978 Op. Att'y Gen. No. 78-44.

**Reprieve to enable prisoner to obtain outside medical treatment.** — The board, in its discretion, may grant a reprieve of a sentence for a specified period of time for the purpose of enabling a prisoner to obtain medical treatments outside of the confines of a state penal institution. 1967 Op. Att'y Gen. No. 67-205.

The board may not permit a prisoner to leave the state under reprieve order so long as the board's own rule prohibits such practice; however, there is no constitutional or statutory provision which would prevent the board from granting a reprieve, for medical purposes, when its members know the pris-

oner intends to leave this state for the purpose of securing medical treatment if the

board changes its rule. 1967 Op. Att'y Gen. No. 67-205.

### RESEARCH REFERENCES

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 44-47.

**ALR.** — Pardon or parole, suspension of sentence or discharge, as affecting fine or penalty imposed in addition to imprisonment, 74 ALR 1118.

Application for or acceptance of executive clemency as affecting appellate proceedings or motion for new trial, 138 ALR 1162.

### 42-9-46. Cases in which inmate has failed to serve time required for automatic initial consideration.

Notwithstanding any other provisions of law to the contrary, if the board is to consider any case in which an inmate has failed to serve the time required by law for automatic initial consideration, the board shall notify in writing, at least ten days prior to consideration, the sentencing judge, the district attorney of the county in which the person was sentenced, and any victim of crimes against the person or, if such victim is deceased, the spouse, children, or parents of the deceased victim if such person's name and address are provided on the impact statement pursuant to Code Section 17-10-1.1. The sentencing judge, district attorney, or victim or, if such victim is deceased, the spouse, children, or parents of the deceased victim may appear at a hearing held by the board or make a written statement to the board expressing their views and making their recommendation as to whether the person should be paroled. (Ga. L. 1972, p. 410, § 1; Ga. L. 1975, p. 793, § 1; Ga. L. 1990, p. 1001, § 1.)

### JUDICIAL DECISIONS

**Construction with minimum service time provisions of § 42-9-45.** — Although § 42-9-45(b) purports to establish the minimum time served before an inmate is eligible for consideration for parole, and this section authorizes the Board of Pardons and Paroles to consider an inmate for parole before the inmate has served the minimum

time specified in § 42-9-45(b), these provisions can be interpreted as meaning that the board can consider an inmate for parole before service of the minimum time specified in § 42-9-45(b), so long as the notice required by this section is given. *Charron v. State Bd. of Pardons & Paroles*, 253 Ga. 274, 319 S.E.2d 453 (1984).

### OPINIONS OF THE ATTORNEY GENERAL

**Constitutional limitations on power of Board of Pardons and Paroles.** — As of January 1, 1995, there are additional constitutional limitations on the power of the Board of Pardons and Paroles to parole. These limitations are the clear prerogative of the General Assembly to proscribe. They include the inability to parole during the

mandatory minimum sentence for the seven serious violent felonies set out in § 17-10-6.1, the inability to parole for sentences of life without parole as set out in §§ 17-10-7(b)(2) and 17-10-16, and the inability to parole for felony recidivists who are convicted for a fourth or subsequent such offense. Other felons and misdemeanants

are required to serve the minimum time prescribed in § 42-9-45(b) subject to the authority reserved by statute to the board in this section to consider those individuals for clemency upon complying with certain notice procedures. 1995 Op. Att'y Gen. No. 95-4.

**No constitutionally protected interest in parole.** — The exceptional parole process governed by this section and § 42-9-45 did not create a constitutionally protected liberty interest in parole. *Worley v. State Bd. of Pardons & Paroles*, 932 F. Supp. 1466 (N.D. Ga. 1996).

**Definite term of sentence or life sentence.** — Where an inmate is serving a sentence the

length of which is definite, notice of consideration by the board must be given until one-third of the sentence has been served; when dealing with life sentences, notice must always be given because it is impossible to determine when one-third of the sentence has been served. 1973 Op. Att'y Gen. No. 73-50.

**Ten days' notice.** — The State Board of Pardons and Paroles is required under this Code section to provide ten days' notice to the sentencing judge and district attorney of the county in which the person is sentenced prior to considering an inmate for parole. 1985 Op. Att'y Gen. No. 85-7.

### RESEARCH REFERENCES

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 34, 45, 50.

**ALR.** — Right to credit on state sentence

for time served under sentence of court of separate jurisdiction where state fails to specify in that regard, 90 ALR3d 408.

### 42-9-47. Notification of decision to parole inmate.

Within 72 hours after the board reaches a final decision to parole an inmate, the district attorney, the presiding judge, the sheriff of each county in which the inmate was tried, convicted, and sentenced, the local law enforcement authorities of the county of the last residence of the inmate prior to incarceration, and the victim of crimes against the person shall be notified of the decision by the chairman of the board. Such notice to the victim shall be mailed to the victim's address as provided for in subsection (c) of Code Section 17-10-1.1. Failure of the prosecuting attorney to provide an address of the victim or failure of the victim to inform the board of a change of address shall not void a parole date set by the board. (Ga. L. 1980, p. 393, § 3; Ga. L. 1985, p. 739, § 2.)

**Editor's notes.** — Section 4 of Ga. L. 1985, p. 739, not codified by the General Assembly,

provided that that Act would only apply to cases filed on or after July 1, 1985.

### 42-9-48. Arrest of parolee or conditional release violator.

(a) If any member of the board shall have reasonable ground to believe that any parolee or conditional releasee has lapsed into criminal ways or has violated the terms and conditions of his parole or conditional release in a material respect, the member may issue a warrant for the arrest of the parolee or conditional releasee.

(b) The warrant, if issued by a member or the board, shall be returned before the board and shall command that the alleged violator of parole or conditional release be brought before the board for a final hearing on



revocation of parole or conditional release within a reasonable time after the preliminary hearing provided for in Code Section 42-9-50.

(c) All officers authorized to serve criminal process, all peace officers of this state, and all employees of the board whom the board specifically designates in writing shall be authorized to execute the warrant.

(d) Any parole supervisor, when he has reasonable ground to believe that a parolee or conditional releasee has violated the terms or conditions of his parole or conditional release in a material respect, shall notify the board or some member thereof; and proceedings shall thereupon be had as provided in this Code section. (Ga. L. 1943, p. 185, § 16; Ga. L. 1965, p. 478, § 1; Ga. L. 1970, p. 187, § 1; Ga. L. 1975, p. 786, § 1; Ga. L. 1979, p. 1020, § 1.)

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**Defendant released by federal authorities subject to arrest.** — Since the defendant's 1979 sentence for violating state criminal laws was to run consecutively to the sentence he was serving for violation of federal criminal laws, and his state sentence did not begin to run until he was released by the federal authorities in 1985, he was subject to arrest under a warrant issued by the board and the search of his person pursuant to his arrest under that warrant was authorized. *Causey v. State*, 208 Ga. App. 389, 430 S.E.2d 594 (1993).

**Grounds for attacking parole revocation**

**under petition for habeas corpus.** — A defendant whose parole has been revoked by the prison commission (now State Board of Pardons and Paroles) cannot by a petition for habeas corpus attack such revocation except upon the grounds of fraud, corruption, or caprice. *Johnson v. Walls*, 185 Ga. 177, 194 S.E. 380 (1937) (decided under former Code 1933, §§ 77-502 through 77-506).

**Cited in** *Balkcom v. Jackson*, 219 Ga. 59, 131 S.E.2d 551 (1963); *Woodall v. State*, 122 Ga. App. 653, 178 S.E.2d 337 (1970).

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**Discretion not delegable.** — The authority vested in members of the board to determine whether a parolee or conditional releasee has lapsed into criminal ways or has violated terms and conditions of his release, and upon an affirmative determination to issue a warrant for the arrest of such parolee or conditional releasee, involves the exercise of judgment and discretion by the member of the board concerned and as such may not be delegated. 1972 Op. Att'y Gen. No. 72-105.

**When hearing required.** — Parole, if properly granted in accordance with law and rules and regulations of the board, may be revoked only after a hearing before the board on a specific charge of violating terms and conditions of parole, except in the event parolee becomes convicted of a crime or

enters plea of guilty to a crime, in which case § 42-9-51 provides for revocation by board without a hearing. However, there need not always be a parole violation before a parole may be revoked. For instance, the authority of board to revoke parole on ground that prisoner had not earned it and was mistakenly granted has been upheld. 1967 Op. Att'y Gen. No. 67-51.

**The board could not issue warrant for arrest of parolee whose recommendation for release was made by member who was possible relative, where there was no question relating to an alleged violation of the terms and conditions of parole, and the board had already taken action based upon the evidence presented.** 1948-49 Op. Att'y Gen. p. 608.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59 Am. Jur. 2d, Pardon and Parole, §§ 96-110.

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 59, 61-64, 67, 68, 71.

**ALR.** — Arresting one who has been

discharged on habeas corpus or released on bail, 62 ALR 462.

Right to assistance of counsel at proceedings to revoke probation, 44 ALR3d 306.

**42-9-49. Reimbursement of counties for incarceration of persons arrested in accordance with Code Section 42-9-48.**

After proper documentation is received from the county, the board shall reimburse the county, pursuant to rules and regulations adopted by the board and in the amount appropriated for this purpose by the General Assembly, for the cost of incarceration of any person who is arrested pursuant to any warrant issued in accordance with Code Section 42-9-48. To the extent that funds are appropriated by the General Assembly for the purpose of reimbursement of medical expenses, the board may reimburse counties for the cost of medical services provided to persons so arrested. The liability of the board for such costs of incarceration shall begin when the person is incarcerated and shall end upon revocation of parole or conditional release of the person. This Code section shall apply only to cases in which the board's warrant is the sole basis for incarceration. (Ga. L. 1979, p. 798, § 1; Ga. L. 1987, p. 428, § 1.)

**42-9-50. Preliminary hearing for parole or conditional release violator; ratification or overruling of decision of hearing officer by board; disposition of violator.**

(a) Whenever a parolee or conditional releasee is arrested on a warrant issued by a member of the board for an alleged violation of parole or conditional release, an informal preliminary hearing in the nature of a court of inquiry shall be held at or near the place of the alleged violation. However, a preliminary hearing is not required if the parolee or conditional releasee is not under arrest on a warrant issued by the board, has absconded from supervision, has signed a waiver of a preliminary hearing, has admitted any alleged violation to any representative of the board in the presence of a third party who is not a representative of the board, or has been convicted of any crime in a federal court or in a court of this state or of another state.

(b) The proceeding shall commence within a reasonable time after the arrest of the parolee or conditional releasee. Its purpose shall be to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee or conditional releasee has committed acts which would constitute a violation of his parole or conditional release.

(c) The preliminary hearing shall be conducted by a hearing officer designated by the board, who shall be some officer who is not directly

involved in the case. It shall be the duty of the officer conducting the hearing to make a summary or digest, which may be in the form of a tape recording, of what transpires at the hearing in terms of the testimony and other evidence given in support of or against revocation. In addition, the officer shall state the reasons for his decision that probable cause for revocation does or does not exist and shall indicate the evidence relied upon.

(d) It shall be the responsibility of the officer selected to conduct the preliminary hearing to provide the alleged violator with written notice of the time and place of the proceeding, its purpose, and the violations which have been alleged. This notice shall allow a reasonable time for the alleged violator to prepare his case.

(e) The officer selected to conduct the preliminary hearing shall have the power to issue subpoenas to compel the attendance of witnesses resident within the county of the alleged violation after notice of 24 hours. The subpoenas shall be issued without discrimination between public and private parties. When a subpoena is disobeyed, any party may apply to the superior court of the county in which the hearing provided for by this Code section is held for an order requiring obedience. Failure to comply with the order shall be cause for punishment as for contempt of court. The manner of service of subpoenas and costs of securing the attendance of witnesses, including fees and mileage, shall be determined, computed, and assessed in the same manner as is prescribed by law for cases in the superior court.

(f) The officer selected to conduct the preliminary hearing shall also have power to issue subpoenas for the production of documents or other written evidence at the hearing provided for by this Code section; but upon written request made promptly and before the hearing, the officer may quash or modify the subpoena if it is unreasonable or oppressive or may condition denial of the request upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the documents or other written evidence. Enforcement of the subpoenas may be sought in the same manner as is provided in subsection (e) of this Code section for subpoenas to compel the attendance of witnesses.

(g) At the hearing, the alleged violator may appear and speak in his own behalf, may present witnesses to testify in his behalf, and may bring letters, documents, or any other relevant information to the hearing officer. He shall also have the right to cross-examine those who have given adverse information at the preliminary hearing relating to the alleged violation, provided that the hearing officer may refuse to allow such questioning if he determines that the informant would be subjected to risk of harm if his identity were disclosed.

(h) Should the hearing officer determine that probable cause for revocation exists, he shall then determine whether the alleged violator



should be incarcerated pending his final revocation hearing or whether he should be set free on his personal recognizance pending that hearing. If an alleged violator who is set free on his personal recognizance subsequently fails to appear at his final hearing, the board may summarily revoke his parole or conditional release.

(i) The decision of the hearing officer as to probable cause for revocation shall not be binding on the board but may be either ratified or overruled by majority vote of the board. In the event that the board overrules a determination of the hearing officer that probable cause did not exist, the board shall then determine whether the alleged violator should be incarcerated pending his final hearing or whether he should be set free on his personal recognizance pending that hearing. If an alleged violator who is set free on personal recognizance subsequently fails to appear at his final hearing, the board may summarily revoke his parole or conditional release. Where a hearing officer has determined, after finding probable cause, that the alleged violator should be set free on his personal recognizance, the board may overrule that decision and order the alleged violator to be incarcerated pending his final hearing. (Ga. L. 1975, p. 786, § 2; Ga. L. 1981, p. 812, § 1.)

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**Cited** in *Ware v. State*, 137 Ga. App. 673, 224 S.E.2d 873 (1976).

RESEARCH REFERENCES

- Am. Jur. 2d.** — 59 Am. Jur. 2d, Pardon and Parole, §§ 101-105.

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 49, 66, 69-71.

**ALR.** — Right to assistance of counsel at
- proceedings to revoke probation, 44 ALR3d 306.

Propriety of increased sentence following revocation of probation, 23 ALR4th 883.

**42-9-51. Final hearing for parole or conditional release violator; order and statement as to disposition of violator; revocations without hearing and temporary revocations.**

(a) A parolee who has allegedly violated the terms of his parole or conditional release shall, except as otherwise provided in this subsection, have a right to a final hearing before the board, to be held within a reasonable time after the occurrence of one of the events listed in this subsection. No final hearing shall be required or permitted if the parolee or conditional releasee has been convicted of or entered any form of guilty plea or plea of nolo contendere in any federal or state court of record to any felony crime, or misdemeanor involving physical injury, committed by the parolee or conditional releasee during a term of parole or conditional release, and which new conviction results in imposition by the convicting court of a term of imprisonment, and, in such cases, the board shall revoke

the entire unexpired term of parole or conditional release. In no case shall a final hearing be required if the parolee or conditional releasee has signed a waiver of final hearing. The final hearing, if any, shall be held within a reasonable time:

(1) After an arrest warrant has been issued by a member of the board and probable cause for revocation has been found by the preliminary hearing officer;

(2) After a majority of the board overrules a determination by the preliminary hearing officer that probable cause does not exist;

(3) After the board or two of its members are informed of an alleged violation and decide to consider the matter of revocation without issuing a warrant for the alleged violator's arrest; or

(4) After a determination has been made that no preliminary hearing is required under subsection (a) of Code Section 42-9-50.

(b) The purpose of the hearing shall be to determine whether the alleged violator has in fact committed any acts which would constitute a violation of the terms and conditions of his parole or conditional release and whether those acts are of such a nature as to warrant revocation of parole or conditional release.

(c) When a parolee or conditional releasee has been convicted of any crime, whether a felony or a misdemeanor, or has entered a plea of guilty or nolo contendere thereto in a court of record, his parole or conditional release may be revoked without a hearing before the board. Moreover, whenever it shall appear to the board that a parolee or conditional releasee either has absconded or has been convicted of another crime in a federal court or in a court of record of another state, the board may issue an order of temporary revocation of parole or conditional release, together with its warrant for such violator, which shall suspend the running of the parolee's or conditional releasee's time from the date of the temporary revocation of parole or conditional release to the date of the determination by the board as to whether the temporary revocation shall be made permanent. If the board determines that there has been no violation of the conditions of the parole or conditional release, then the parolee or the releasee shall be reinstated upon his original parole or conditional release without any loss of time and the order of temporary revocation of parole or conditional release and the warrant shall be withdrawn.

(d) In all cases in which there is a hearing before the board, the alleged violator shall be given written notice of the time and place of the hearing and of the claimed violations of parole or conditional release. In addition, this notice shall advise him of the following rights:

(1) His right to disclosure of evidence introduced against him; provided, however, this right shall not be construed to require the board to

disclose to an alleged violator confidential information contained in its files which has no direct bearing on the matter of parole revocation;

(2) His opportunity to be heard in person and to present witnesses and documentary evidence;

(3) His right to confront and cross-examine adverse witnesses, unless a majority of the board determines that disclosure of a particular informant's identity would cause that informant or a member of his family to suffer a risk of harm; and

(4) His right to subpoena witnesses and documents through the board as provided in subsections (e) and (f) of this Code section.

The notice shall be served by delivering it to the alleged violator in person, by delivering it to a person 18 years or older at his last known place of residence, or by depositing it in the mail properly addressed to his last known place of residence.

(e) The board shall have the power to issue subpoenas to compel the attendance of witnesses at the hearing provided for by this Code section. The subpoenas shall be issued without discrimination between public and private parties. When a subpoena is disobeyed, any party may apply to the superior court of the county in which the hearing provided for by this Code section is held for an order requiring obedience. Failure to comply with the order shall be cause for punishment as for contempt of court. The manner of service of subpoenas and costs of securing the attendance of witnesses, including fees and mileage, shall be determined, computed, and assessed in the same manner as prescribed by law for cases in the superior court.

(f) The board shall have the power to issue subpoenas for the production of documents or other written evidence at the hearing provided for by this Code section, but upon written request made promptly and before the hearing the board may quash or modify the subpoena if it is unreasonable or oppressive or may condition denial of the request upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the documents or other written evidence. Enforcement of such subpoenas may be sought in the same manner as is provided in subsection (e) of this Code section for subpoenas to compel attendance of witnesses.

(g) Within a reasonable time after the hearing provided for by this Code section, the board shall enter an order (1) rescinding parole or conditional release and returning the parolee or conditional releasee to serve the sentence theretofore imposed upon him, with benefit of computing the time so served on parole or conditional release as a part of his sentence; or (2) reinstating the parole or conditional release or shall enter such other order as it may deem proper. The board shall issue a written statement which shall indicate its reasons for revoking or not reinstating parole or



conditional release or for taking such other action as it deems appropriate and shall also indicate the evidence relied upon in determining the facts which form the basis for these reasons. The parolee or conditional releasee who is the subject of the board's decision shall be furnished with a copy of this written statement. (Ga. L. 1943, p. 185, § 17; Ga. L. 1955, p. 351, § 1; Ga. L. 1964, p. 497, § 1; Ga. L. 1965, p. 478, § 2; Ga. L. 1975, p. 786, § 3; Ga. L. 1981, p. 812, § 2; Ga. L. 1992, p. 3221, § 11.)

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### REQUIREMENT OF DUE PROCESS FOR PAROLE REVOCATION

##### PRIOR HEARING NOT MANDATORY

##### NECESSITY FOR ISSUING REVOCATION ORDER BASIS FOR PAROLE REVOCATION

#### General Consideration

##### **Applicability of double jeopardy clause.** —

Because parole and probation revocation proceedings are not designed to punish a criminal defendant for violation of a criminal law, and because the purpose of parole and probation revocation proceedings is to determine whether a parolee or probationer has violated the conditions of his parole or probation, such proceedings are fundamentally distinguishable from juvenile proceedings, the latter being indistinguishable from a criminal prosecution, and, thus, the double jeopardy clause of U.S. Const., Amend. 5 does not apply to parole and probation revocation proceedings. *United States v. Whitney*, 649 F.2d 296 (5th Cir. 1981).

Cited in *Woodall v. State*, 122 Ga. App. 653, 178 S.E.2d 337 (1970); *Brown v. Peacock*, 235 Ga. 834, 221 S.E.2d 594 (1976); *United States v. Cornog*, 945 F.2d 1504 (11th Cir. 1991).

##### **Requirement of Due Process for Parole Revocation**

**Loss of liberty involved in a parole revocation** is a serious deprivation requiring that a parolee be afforded due process. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

**Revocation after forfeiture of bond in traffic violation case.** — Failure to hold hearing prior to revocation of parole after forfeiture of bond arising from traffic violation was denial of due process of law. Admis-

sion of guilt to traffic offense under jurisdiction of traffic violations bureau, whether by forfeiture of bond or by plea, is not exception to statutory mandate to provide speedy hearing before rescission of parole. *Duncan v. Ricketts*, 232 Ga. 89, 205 S.E.2d 274 (1974).

##### **Delay of revocation hearing until expiration of sentence imposed by another state.**

— This section requires a parole revocation hearing, but where a person has committed a crime in another state, has been convicted, and is incarcerated in that state, it is not unconstitutional to delay the parole revocation hearing until expiration of that later sentence. *Moultrie v. Georgia*, 464 F.2d 551 (5th Cir. 1972).

##### **Prior Hearing Not Mandatory**

**"Crimes" limited to felonies or misdemeanors.** — This section limits "crimes" authorizing parole revocation without prior hearing to misdemeanors or felonies. *Duncan v. Ricketts*, 232 Ga. 89, 205 S.E.2d 274 (1974).

##### **Necessity for Issuing Revocation Order**

**Computation of time served by parolee for later conviction.** — Where a prisoner serving sentence on parole under order of the board is convicted and sentenced to serve time for another criminal offense, the time he serves on latter sentence will be computed as time served on sentence for which he was paroled, until such time as the

board by order revokes his parole. Even though warrant is issued for arrest of parolee as parole violator and the parolee arrested, service of his sentence continues until the board issues an order of revocation and for his return to prison. *Balkcom v. Jackson*, 219 Ga. 59, 131 S.E.2d 551 (1963).

#### **Basis for Parole Revocation**

**Where defendant and trial judge agreed on restitution** as condition of defendant's

probated sentence and where there was evidence that defendant was able to pay other bills and he continued to operate his business and pay business expenses, this could and did serve as basis of defendant's parole revocation. *Fong v. State*, 149 Ga. App. 456, 254 S.E.2d 460 (1979).

### **OPINIONS OF THE ATTORNEY GENERAL**

**When hearing required.** — Parole, if properly granted in accordance with law and rules and regulations of the board, may be revoked only after a hearing before the board on a specific charge of violating the terms and conditions of his parole except in the event he becomes convicted of a crime or enters a plea of guilty to a crime in which case this section provides for revocation by the board without a hearing. However, there need not always be a parole violation before a parole may be revoked. For instance, the authority of a parole board to revoke a parole on the ground that the prisoner had not earned it and was mistakenly granted has been upheld. 1967 Op. Att'y Gen. No. 67-51.

**Notices of preliminary and final hearings** to consider parole revocation should include a statement that an indigent parolee may request appointed counsel. 1974 Op. Att'y Gen. No. 74-119.

**Rearrest of prisoner to serve remainder of original paroled sentence.** — A prisoner paroled after serving eight months of a one to three year sentence, and a month later convicted on a new charge, sentenced to six months, and his parole revoked, who was released at the end of the new sentence, may not be rearrested seven years later to serve the balance of his original sentence. 1945-47 Op. Att'y Gen. p. 452.

**Court of record.** — The General Assembly does not have to declare that a particular court is of record for that court to be of record; rather, the legislative declaration may be helpful in ascertaining whether a particular court is of record. If a particular court keeps records as appear reasonably calculated to preserve as perpetual memorial acts and judicial proceedings of such court, the court is "court of record." 1973 Op. Att'y Gen. No. 73-17.

### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59 Am. Jur. 2d, Pardon and Parole, §§ 101, 102, 106-113.

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 64-66, 69, 72-76, 78, 80-83.

**ALR.** — Parole as suspending running of sentence, 28 ALR 947.

Right to assistance of counsel at proceed-

ings to revoke probation, 44 ALR3d 306.

Acquittal in criminal proceeding as precluding revocation of probation on same charge, 76 ALR3d 564.

Propriety of increased sentence following revocation of probation, 23 ALR4th 883.

### **42-9-52. Discharge from parole; earned-time allowance; granting of pardons, commutations, and remissions of fines, forfeitures, or penalties.**

No person who has been placed on parole shall be discharged therefrom by the board prior to the expiration of the term for which he was sentenced or until he shall have been duly pardoned or otherwise released as provided

in this Code section or as otherwise provided by law. The board may adopt rules and regulations, policies, and procedures for the granting of earned time to persons while serving their sentences on parole or other conditional release to the same extent and in the same amount as if such person were serving the sentence in custody. The board shall also be authorized to withhold or to forfeit, in whole or in part, any such earned-time allowance. The board may relieve a person on parole or other conditional release from making further reports and may permit the person to leave the state or county if satisfied that this is for the parolee's or conditional releasee's best interest and for the best interest of society. When a parolee or other conditional releasee has, in the opinion of the board, so conducted himself as to deserve a pardon or a commutation of sentence or the remission in whole or in part of any fine, forfeiture, or penalty, the board may grant such relief in cases within its power. (Ga. L. 1943, p. 185, § 18; Ga. L. 1965, p. 478, § 3; Ga. L. 1980, p. 402, § 1.)

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Cited in *Woodall v. State*, 122 Ga. App. 653, 178 S.E.2d 337 (1970).

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**This section and § 42-9-42, construed together,** mean that paroled prisoner while serving sentence outside of confines of prison continues to serve under supervision of prison authorities. 1945-47 Op. Att'y Gen. p. 441.

**Reimbursement for medical care provided to parolees.** — A person to whom prisoner suffering from tuberculosis has been paroled should be reimbursed for providing proper medical care. 1945-47 Op. Att'y Gen. p. 441.

**The board's rules governing good time** should be applied to inmates released on probation by the board. 1970 Op. Att'y Gen. No. 70-201.

**Effect of § 42-5-100 on board's powers.** — Section 42-5-100, which terminates the power of the Board of Offender Rehabilitation (Corrections) to provide for earned-time allowances for inmates under its supervision or custody, has no effect on the powers of the State Board of Pardons and Paroles to grant earned time to persons serving their sentences on parole or other conditional release, and further has no effect on the board's authority to withhold or to forfeit, in whole or in part, any such

earned-time allowances. 1984 Op. Att'y Gen. No. 84-7.

**There are two types of "earned time":** "parole earned time" granted by the State Board of Pardons and Paroles pursuant to its rules and regulations, and "incarcerated earned time" granted by the Department of Offender Rehabilitation (Corrections) pursuant to its rules and regulations. 1980 Op. Att'y Gen. No. 80-113.

**"Earned time" construed.** — The term "earned time" means a reward for good behavior by the giving of additional credit for days served toward completion of a criminal sentence, just as the term was understood in §§ 42-5-100 (rewritten effective January 1, 1984) and 42-5-101 (repealed effective January 1, 1984). 1980 Op. Att'y Gen. No. 80-113.

The reference in this section to "earned time" should be construed as a reference to "parole earned time" — that granted by the board. 1980 Op. Att'y Gen. No. 80-113.

**Limits on power to withhold or forfeit earned time.** — The board is not authorized, upon revocation of a parole or other conditional release, to withhold earned time for a period of time which would extend into the period of reincarceration resulting from the



revocation. It also may not forfeit, upon revocation of a parole or other conditional release, earned time which was totally or

partially earned while in prison prior to release on parole or other conditional release. 1980 Op. Att'y Gen. No. 80-113.

#### RESEARCH REFERENCES

**C.J.S.** — 67A C.J.S., Pardon and Parole, § 60.

**ALR.** — Consent of convict as essential to a pardon, commutation, or reprieve, 52 ALR 835.

Right to assistance of counsel at proceed-

ings to revoke probation, 44 ALR3d 306.

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension or sentence thereon, 58 ALR3d 1156.

#### **42-9-53. Preservation of documents; classification of information and documents; divulgence of confidential state secrets; conduct of hearings.**

(a) Subject to other laws, the board shall preserve on file all documents on which it has acted in the granting of pardons, paroles, and other relief.

(b) All information, both oral and written, received by the members of the board in the performance of their duties under this chapter and all records, papers, and documents coming into their possession by reason of the performance of their duties under this chapter shall be classified as confidential state secrets until declassified by a resolution of the board passed at a duly constituted session of the board; provided, however, that the board shall be authorized to disclose to an alleged violator of parole or conditional release the evidence introduced against him at a final hearing on the matter of revocation of parole or conditional release.

(c) No person shall divulge or cause to be divulged in any manner any confidential state secret. Any person violating this Code section or any person who causes or procures a violation of this Code section or conspires to violate this Code section shall be guilty of a misdemeanor.

(d) All hearings required to be held by this chapter shall be public, and the transcript thereof shall be exempt from subsection (b) of this Code section. All records and documents which were public records at the time they were received by the board are exempt from subsection (b) of this Code section. All information, reports, and documents required by law to be made available to the General Assembly, the Governor, or the state auditor are exempt from subsection (b) of this Code section. (Ga. L. 1943, p. 185, § 20; Ga. L. 1953, Nov.-Dec. Sess., p. 210, § 1; Ga. L. 1975, p. 786, § 4; Ga. L. 1982, p. 3, § 42.)

**Cross references.** — Management of records of state entities generally, § 50-18-90 et seq.

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**Constitutionality.** — This section is not unconstitutional under Ga. Const. 1976, Art. IV, Sec. II, Para. I (see Ga. Const. 1983, Art. IV, Sec. II, Para. I, II and § 42-9-19). The confidentiality provisions of this section apply to all information, documents, memoranda, and records of the board except those required to be made available to the General Assembly under Ga. Const. 1976, Art. IV, Sec. II, Para. I (see Ga. Const. 1983, Art. IV, Sec. II, Paras. I, II and § 42-9-19), and except transcripts of any hearing conducted by the board in any matter. *Morris v. State*, 246 Ga. 510, 272 S.E.2d 254 (1980).

**Exemption from confidentiality requirement.** — This section expressly exempts from confidentiality any information which, by virtue of Ga. Const. 1976, Art. IV, Sec. II, Para. I (see Ga. Const. 1983, Art. IV, Sec. II, Para. I, II and § 42-9-19), is mandated for inclusion in fully detailed annual report to General Assembly of the reasons for granting sentence relief to a prisoner. *Morris v. State*, 246 Ga. 510, 272 S.E.2d 254 (1980).

**Disclosure of parole file to defendant.** — In the event of a retrial as to sentence in this particular case, the appropriate procedure to be followed is that specified in *Walker v. State*, 254 Ga. 149(4), 327 S.E.2d 475 (1985), i.e., upon a timely and proper request, the

trial court should obtain the parole file of the defendant and review it in camera. Those portions of the file, if any, which are potentially mitigating should be disclosed to the defendant. *Pope v. State*, 256 Ga. 195, 345 S.E.2d 831 (1986), cert. denied, 484 U.S. 873, 108 S. Ct. 207, 98 L. Ed. 2d 159 (1987).

**Inmate not allowed to examine file.** — The refusal of a parole board to allow an inmate to examine his file does not assume the proportions of a deprivation of his rights under the Constitution or the laws of the United States. *Jackson v. Reese*, 608 F.2d 159 (5th Cir. 1979).

**In camera inspection of parole files of persons other than defendant.** — At least in the absence of a reasonably specific request for relevant and competent information, the trial court may decline to conduct an in camera inspection of parole files of persons other than the defendant. *Stripling v. State*, 261 Ga. 1, 401 S.E.2d 500 (1991), cert. denied, 502 U.S. 985, 112 S. Ct. 593, 116 L. Ed. 2d 617 (1991).

**Cited in** *Partain v. Maddox*, 131 Ga. App. 778, 206 S.E.2d 618 (1974); *Smith v. Kemp*, 715 F.2d 1459 (11th Cir. 1983); *Potts v. State*, 259 Ga. 96, 376 S.E.2d 851 (1989); *Isaacs v. State*, 259 Ga. 717, 386 S.E.2d 316 (1989).

## OPINIONS OF THE ATTORNEY GENERAL

**Availability of information to Governor.** — It was not the intent of this section that the records of the board be kept secret from the Governor; files relating to a parole action should be made available to him at his request. 1967 Op. Att'y Gen. No. 67-51 (decided under Ga. Const. 1945, Art. V, Sec. I, Para. XI (see Ga. Const. 1983, Art. IV, Sec. II, Para. II)).

**The Board of Corrections may make referrals** to local, community recreation officials, indicating that released inmate has recreation skills which might be helpful to community, provided that the board first

obtains the inmate's signed authorization. 1972 Op. Att'y Gen. No. 72-148.

**Misdemeanor files should be kept confidential** and it is inconsistent with privacy to place the files under custody of some person or persons other than the board as the board alone is entrusted with the safekeeping of these files. 1963-65 Op. Att'y Gen. p. 318.

**The board must declassify**, by a resolution passed at a duly constituted session of the board, all records which it seeks to have destroyed that are not included in one of the statutory exceptions relating to records of the board. 1971 Op. Att'y Gen. No. 71-196.

## RESEARCH REFERENCES

**ALR.** — Right to assistance of counsel at proceedings to revoke probation, 44 ALR3d 306.

#### 42-9-54. Effect of pardons upon civil and political disabilities; conditional pardons prohibited.

(a) All pardons shall relieve those pardoned from civil and political disabilities imposed because of their convictions.

(b) No conditional pardons shall be issued. (Ga. L. 1943, p. 185, §§ 20, 26.)

## JUDICIAL DECISIONS

**Ineligibility to hold office.** — Where the right of a county commissioner to hold office is attacked by reason of the commissioner having been, previous to his election, convicted of a felony, and therefore not a qualified voter or eligible "to hold any civil office," the fact that he received a pardon

after the institution of the quo warranto proceedings, but prior to the decision of the trial judge, does not remove his ineligibility. *Hulgan v. Thornton*, 205 Ga. 753, 55 S.E.2d 115 (1949).

**Cited in** *Carnes v. Crawford*, 246 Ga. 677, 272 S.E.2d 690 (1980).

## OPINIONS OF THE ATTORNEY GENERAL

**Civil disabilities restorable by pardon generally.** — The "civil disabilities" which may be restored by pardon following conviction for crime and suspension or revocation of civil rights are the customary civil rights which ordinarily belong to a citizen of the state which are generally conceded or recognized to be the right to hold office, to vote, to serve on a jury. 1954-56 Op. Att'y Gen. p. 506.

**License to carry pistol.** — Relief by pardon applies to those disabilities placed upon persons who have been convicted of felony or forcible misdemeanor and are seeking to secure a license to carry a pistol under § 16-11-129. Op. Att'y Gen. No. U71-10.

**Ineligibility to hold office.** — Construing Ga. Const. 1976, Art. II, Sec. II, Para. I (see Ga. Const. 1983, Art. II, sec. II, Para. III), and this section, a person who has been convicted of any crime involving moral tur-

pitude and who has not been subsequently pardoned is not eligible to hold the office of trustee for a local public school. 1954-56 Op. Att'y Gen. p. 295.

**Reinstatement of driver's license.** — Notwithstanding fact that an individual has been pardoned for a traffic offense, he is not entitled to have his driver's license rein-stated. 1954-56 Op. Att'y Gen. p. 506.

**Other rights not affected by pardon.** — The right to operate a motor vehicle, to practice a profession, and other extraordinary rights granted and regulated by the state under its police power are not affected by a pardon. 1954-56 Op. Att'y Gen. p. 506.

**Conviction cannot be denied under oath.** — A convicted felon cannot state under oath, after pardon, that he has never been convicted of a crime. 1973 Op. Att'y Gen. No. 73-61.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 59 Am. Jur. 2d, Pardon and Parole, §§ 49-62.

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 18-20.



**ALR.** — Pardon as affecting previous offenses or punishment therefor, 57 ALR 443.

Pardon as defense to proceeding for suspension or cancellation of license of physician, surgeon, or dentist, 126 ALR 257.

Pardon as restoring public office or license or eligibility therefor, 58 ALR3d 1191.

Pardon as defense to disbarment of attorney, 59 ALR3d 466.

Right in absence of express statutory authorization, of one convicted of crime and imprisoned or paroled, to prosecute civil action, 74 ALR3d 680.

#### **42-9-55. Cooperation by jails or correctional institutions with board.**

The superintendent, warden, or jailer of any jail or state or county correctional institution in which persons convicted of a crime may be confined and all officers or employees thereof shall at all times cooperate with the board and, upon its request, shall furnish it with such information as they may have respecting any person inquired about as will enable the board properly to perform its duties. Such officials shall, at all reasonable times, when the public safety permits, give the members of the board and its authorized agents and employees access to all inmates in their charge. (Ga. L. 1943, p. 185, § 19.)

#### **42-9-56. Restriction on Governor's powers.**

The Governor shall have no authority or power whatever over the granting of pardons or paroles. (Ga. L. 1943, p. 185, § 21; Ga. L. 1983, p. 500, § 7.)

**Cross references.** — Imposition and review of death sentences generally, § 17-10-30 et seq.

**Editor's notes.** — Section 1 of Ga. L. 1983, p. 500, not codified by the General Assembly,

provides as follows: "It is the intent of this Act to implement certain changes required by Article IV, Section II of the Constitution of the State of Georgia."

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 59 Am. Jur. 2d, Pardon and Parole, §§ 14, 17, 78.

**ALR.** — Power of executive to pardon one for contempt, 26 ALR 21; 38 ALR 171; 63 ALR 226.

Judicial investigation of pardon by Governor, 30 ALR 238; 65 ALR 1471.

Power to pardon or commute sentence as one which devolves upon the Lieutenant Governor during the absence or disability of the Governor, 32 ALR 1162.

Offenses and convictions covered by pardon, 35 ALR2d 1261.

#### **42-9-57. Effect of chapter on probation power of courts; cooperation by board with local agencies.**

Nothing contained in this chapter shall be construed as repealing any power given to any court of this state to place offenders on probation or to supervise the same nor any power of any probation agency set up in any county of the state in conjunction with the courts. The board shall be authorized to cooperate with any such agencies, except that it shall not

assume or pay any financial obligations thereof. The board shall also be authorized to cooperate with the courts for the probation of offenders in those counties in which there is no existing probation agency, when a court so requests. (Ga. L. 1943, p. 185, § 22; Ga. L. 1994, p. 97, § 42.)

#### OPINIONS OF THE ATTORNEY GENERAL

**Separate and distinct functions.** — Functions of the board are legislatively mandated to remain separate and distinct from those of the Department of Corrections' Probation Division. 1986 Op. Att'y Gen. No. 86-7.

#### **42-9-58. Effect of chapter on other laws respecting parole and probation.**

Nothing in this chapter shall be construed to change or modify the laws respecting parole and probation as administered by the juvenile courts of this state or the Department of Human Resources or the courts where persons have been placed on probation in cases involving nonsupport or abandonment of minor children. (Ga. L. 1943, p. 185, § 25.)

#### **42-9-59. Effect of chapter on previously granted pardons, paroles, and probations.**

This chapter shall not affect pardons, paroles, or probations acted upon prior to February 5, 1943. (Ga. L. 1943, p. 185, § 27.)

#### **42-9-60. Overcrowding of prison system as creating state of emergency; paroling inmates to reduce prison system population to capacity; annual report of inmates paroled.**

(a) As used in this Code section, the term:

(1) "Capacity" shall mean the actual bed space in the prison system of the State of Georgia now or in the future, as certified by the commissioner of corrections and approved by the director of the Office of Planning and Budget.

(2) "Dangerous offender" means a state prison inmate who is imprisoned for conviction of any one or more of the following crimes as defined by Title 16, the "Criminal Code of Georgia": murder, voluntary manslaughter, kidnapping, armed robbery, rape, aircraft hijacking, aggravated sodomy, aggravated battery, aggravated assault, incest, child molestation, child abuse, or enticing a child for indecent purposes, or any felony punishable under Code Section 16-13-31, relating to prohibited acts regarding marijuana, cocaine, and illegal drugs. The term "dangerous offender" shall also include an inmate who is incarcerated for a second or subsequent time for the commission of a crime for which the inmate could have been sentenced to life imprisonment.

(3) "Population" shall mean the actual number of inmates present in the correctional institutions of the state prison system and shall not include state inmates assigned to county operated correctional institutions.

(b) The Governor, upon certification by the commissioner of corrections and approval by the director of the Office of Planning and Budget that the population of the prison system of the State of Georgia has exceeded the capacity for 30 consecutive days, may, within five days of receipt of the commissioner's certification, declare a state of emergency with regard to jail and prison overcrowding.

(c) Upon the declaration of a state of emergency with regard to the jail and prison overcrowding by the Governor, the board shall select sufficient state prison inmates to reduce the state prison population to 100 percent of its capacity and issue such selected inmates a parole, but no dangerous offender shall be eligible for selection by the board. The board shall give special consideration for early release under this Code section to inmates who have participated in educational programs and who have achieved a fifth-grade level or higher on standardized reading tests. The selection of state prison inmates to be released under the authority contained in this Code section may be made without regard to limitations placed upon the service of a portion of the prison sentence provided by Code Section 42-9-45.

(d) It shall be the duty of the director of the Office of Planning and Budget to prepare an annual report on prison inmates who are paroled pursuant to this Code section. Such report shall summarize each such former inmate's behavior since parole and generally evaluate the former inmate's success or lack of success in becoming a law-abiding member of society. The annual report shall be filed with the Clerk of the House of Representatives and the Secretary of the Senate on or before December 31, with the first such report submitted by December 31 of the first year that prison inmates are paroled pursuant to this Code section. A notice of the filing of this report shall be submitted to each member of the General Assembly when the annual report is filed with the Clerk of the House of Representatives and the Secretary of the Senate. Copies of this report shall be made available to members of the General Assembly upon their request. The board, the Department of Corrections, and other departments and agencies of the state government shall cooperate with and assist the director of the Office of Planning and Budget in developing the information necessary to prepare the annual reports required by this subsection. (Ga. L. 1982, p. 1356, §§ 2-5; Code 1981, § 42-9-60, enacted by Ga. L. 1982, p. 1356, § 6; Ga. L. 1983, p. 3, § 31; Ga. L. 1984, p. 22, § 42; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 1986, p. 1596, § 5; Ga. L. 1997, p. 143, § 42.)



The 1997 amendment, effective March 28, 1997, part of an Act to correct errors and omissions in the Code, revised punctuation in paragraph (2) of subsection (a) of this Code section.

**Code Commission notes.** — The two 1985 amendments substituted different language for the word “herein” in the second sentence of subsection (c). The amendment effected by Ga. L. 1985, p. 283, § 1 has been treated as controlling.

Section 1 of Ga. L. 1982, p. 1356 (§ 6 of which enacted this Code section) did not amend the Official Code of Georgia Annotated or any prior law. Sections 1 through 5 of the 1982 Act became effective April 14, 1982, but, unlike §§ 2 through 5, § 1 did not stand repealed on November 1, 1982; see § 7 of the 1982 Act. Section 1 reads as follows: “The General Assembly recognizes that the number of persons convicted of crimes in the State of Georgia and sentenced to serve terms of imprisonment in the state prison system has increased greatly in recent years; that, under the moral requirements of humane treatment for prisoners, there is a limit to the present capacity of penal institutions comprising the prison system of the State of Georgia; that, because of the limited present capacity of the state penal system,

there is a resulting crisis in overcrowding of local jail and detention facilities due to the backlog of convicted persons awaiting transfer to the state prison system; that the delay in time required to construct new state prison facilities in order to increase the capacity of the state prison system would cause little present relief of the crisis of overcrowding which exists in jail and local detention facilities; that there is an uncertainty as to future needs for additional capacity in the state prison system if alternatives to incarceration are adequately developed and utilized after the present crisis has passed; that there is an uncertainty as to the necessity for local governments to build additional bed space in jails and local detention facilities at their own expense to alleviate the present overcrowding crisis if the present state capacity may be better utilized to relieve that crisis; and, finally, that the release of state prison inmates not otherwise eligible for release on parole is necessary to alleviate the overcrowded prison system during a declared emergency. It is the purpose of this Act to authorize the Governor and the State Board of Pardons and Paroles to remedy an emergency with regard to the overcrowding of the state prison system.”

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 59 Am. Jur. 2d, Pardon and Parole, §§ 78, 79. 60 Am. Jur. 2d, Penal and Correctional Institutions, § 87.

**C.J.S.** — 67A C.J.S., Pardon and Parole, §§ 41, 47, 48. 72 C.J.S., Prisons and Rights of Prisoners, § 72.

## ARTICLE 3

### UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION

#### 42-9-70. Short title.

This article shall be known and may be cited as the “Uniform Act for Out-of-State Parolee Supervision.” (Ga. L. 1950, p. 405, § 4.)

#### 42-9-71. Execution and text of compact.

The Governor of this state is authorized and directed to execute a compact on behalf of the State of Georgia with any of the United States legally joining therein in the form substantially as follows:

### A COMPACT

Entered into by and among the contracting States, signatories hereto, with the consent of the Congress of the United States of America, granted by an Act entitled "An act granting the consent of Congress to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting States solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a State party to this compact (herein called "sending State"), to permit any person convicted of an offense within such State and placed on probation or released on parole to reside in any other State party to this compact (herein called "receiving State"), while on probation or parole, if

(a) Such person is in fact a resident of or has his family residing within the receiving State and can obtain employment there;

(b) Though not a resident of the receiving State and not having his family residing there, the receiving State consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving State to investigate the home and prospective employment of such person.

(1) A resident of the receiving State, within the meaning of this section, is one who has been an actual inhabitant of such State continuously for more than one year prior to his coming to the sending State and has not resided within the sending State more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving State will assume the duties of visitation of and supervision over probationers or parolees of any sending State and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending State may at all times enter a receiving State and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of States party hereto, as to such persons. The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State: Provided, however, that if at the time when a State seeks to retake a probationer or parolee there should be pending against him within

the receiving State any criminal charge, or he should be suspected of having committed within such State a criminal offense, he shall not be retaken without the consent of the receiving State until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending State will be permitted to transport prisoners being retaken through any and all States parties to this compact, without interference.

(5) That the Governor of each State may designate an officer who, acting jointly with like officers of other contracting States, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its execution by any State as between it and any other State or States so executing. When executed it shall have the full force and effect of law within such State, the form of execution to be in accordance with the laws of the executing State.

(7) That this compact shall continue in force and remain binding upon each executing State until renounced by it. The duties and obligations hereunder of a renouncing State shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending State. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other State party hereto. (Ga. L. 1950, p. 405, § 1; Ga. L. 1996, p. 6, § 42.)

**The 1996 amendment**, effective February 12, 1996, part of an Act to correct errors and omissions in the Code, added the parenthetical designations throughout the section.

**U.S. Code.** — The federal act granting

consent of Congress to agreements or compacts between states for cooperative effort and mutual assistance in prevention of crime and for other purposes, referred to in this section, is codified at 4 U.S.C. § 112.

### JUDICIAL DECISIONS

**Revocation of unexpired probationary sentence.** — Where a person is convicted of a crime in another state and given a probationary sentence, with permission to return to this state under supervision of a probation officer of this state, and before expiration of his probationary sentence his probation is revoked by the court in which he was convicted, he is a fugitive from justice subject to extradition. *Jeffers v. State*, 217 Ga. 740, 124 S.E.2d 753 (1962).

Whether or not revocation of the probationary sentence by the demanding state in probationer's absence was illegal under the laws of that state, is a question for the demanding state to decide under its constitution, statutory laws, and judicial decisions. *Jeffers v. State*, 217 Ga. 740, 124 S.E.2d 753 (1962).

**Cited in** *Carroway v. Stynchcombe*, 225 Ga. 586, 170 S.E.2d 396 (1969).



## OPINIONS OF THE ATTORNEY GENERAL

**Return of parolees to sending state.** — Parolees under supervision in this state pursuant to this article may be picked up and returned to the sending state upon compliance with the requirements of this article and without necessity of extradition proceedings. 1965-66 Op. Att'y Gen. No. 66-39.

**Conditional parolees from other states.** — Under paragraph (3) of this section provi-

sions of the extradition law of this state are expressly waived by this state with reference to conditional parolees from other states. 1958-59 Op. Att'y Gen. p. 253.

Section 17-13-30 is not applicable to prisoners who are paroled to this state under this article, and who have signed a waiver of extradition as a condition of parole. 1958-59 Op. Att'y Gen. p. 253.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 31 Am. Jur. 2d, Extradition, § 31. 59 Am. Jur. 2d, Pardon and Parole, § 83.

**C.J.S.** — 16 C.J.S., Constitutional Law, §§ 136, 219-221. 67A C.J.S., Pardon and Parole, §§ 39, 40, 58, 62, 71.

## CHAPTER 10

## CORRECTIONAL INDUSTRIES

Sec.		Sec.	
42-10-1.	Short title.		executive officer; powers generally.
42-10-2.	Correctional Industries Administration created; corporate powers generally.	42-10-4.	Powers of administration.
42-10-3.	Board of Corrections as ex officio Correctional Industries Administration; commissioner as	42-10-5.	Responsibility for custodial care of inmates utilized by administration.

## OPINIONS OF THE ATTORNEY GENERAL

**Establishment of employee suggestion and awards program.** — The Board of Corrections can establish a prospective suggestion and awards program for the employees of the Georgia Correctional Industries Administration who are in the unclassified service of the State Merit System. 1987 Op. Att'y Gen. No. 87-6.

**Correctional industries administration is authority and not a "budget unit."** — The Georgia correctional industries administration is an authority and is not a "budget unit" required to request and follow a budget established by appropriations in accord with the Budget Act. 1989 Op. Att'y Gen. No. 89-56.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, §§ 162-172.

**C.J.S.** — 18 C.J.S., Convicts, §§ 13-20.

## 42-10-1. Short title.

This chapter shall be known and may be cited as the "Correctional Industries Act." (Ga. L. 1960, p. 880, § 1; Ga. L. 1972, p. 572, § 1.)

## 42-10-2. Correctional Industries Administration created; corporate powers generally.

There is created, as a body corporate and politic, an instrumentality and public corporation of this state to be known as the "Georgia Correctional Industries Administration." It shall have perpetual existence. In such name it may contract and be contracted with, bring and defend actions, implead and be impleaded, and complain and defend in any and all courts. (Ga. L. 1960, p. 880, § 2.)

## OPINIONS OF THE ATTORNEY GENERAL

**Development of service-type industrial programs.** — The Board of Corrections is authorized to develop service-type industrial programs such as furniture refinishing, but

such programs may not be developed by the Georgia Prison Industries Administration (now Georgia Correctional Industries Administration). 1970 Op. Att'y Gen. No. 70-156.

**42-10-3. Board of Corrections as ex officio Correctional Industries Administration; commissioner as executive officer; powers generally.**

For the purposes of this chapter, the Board of Corrections shall constitute, ex officio, the Georgia Correctional Industries Administration. The board, constituted as the Georgia Correctional Industries Administration, shall have the power to perfect its own organization and to adopt such rules and bylaws as may be necessary for it to carry out its duties under this chapter. The commissioner of corrections shall serve as the executive officer of the administration. (Ga. L. 1980, p. 731, § 1; Ga. L. 1985, p. 283, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 63A Am. Jur. 2d, Public Officers and Employees, §§ 135, 137, 431-434, 460. **C.J.S.** — 67 C.J.S., Officers, §§ 219, 223, 225.

**42-10-4. Powers of administration.**

The administration shall have, in addition to any other powers conferred by this chapter, the following powers:

- (1) To have a seal and alter the same at pleasure;
- (2) To acquire by purchase, lease, or otherwise and to hold, lease, and dispose of, in any manner, real and personal property of every kind and character for its corporate purposes;
- (3) To appoint, upon the recommendations of its chief executive officer, such additional officers, agents, and employees as may, in its judgment, be necessary to carry on the business of the administration; to fix the compensation for such officers and employees; and to promote and discharge the same. However, all legal services for the administration shall be rendered by the Attorney General and his staff and no fee shall be paid to any attorney or law firm for legal services. The administration shall be authorized to pay such fees, stamps, and licenses and any court costs that may be incurred by virtue of the powers granted in this Code section;
- (4) To have the same powers and authority possessed by the Department of Corrections in connection with the manufacture and sale of products;
- (5) To utilize any and all inmates who may be made available for its corporate purposes by the Department of Corrections. The administra-



tion shall not be required to make any payment to the Department of Corrections for the use of such labor and shall not compensate inmates employed in any industry or performing services at any correctional institution;

(6) To retain its earnings for expenditure upon any lawful purpose of the administration;

(6.1) To conduct vocational training of inmates without regard to their industrial or other assignment;

(6.2) To construct, erect, install, equip, repair, replace, maintain, and operate facilities of every character, consistent with its purposes; provided, however, that the Department of Corrections may not contract with the administration to transfer to it any capital outlay appropriations unless the appropriation was by line item expressly designating such a purpose; provided, further, the warehouse, the construction of which commenced in DeKalb County in 1988 by the administration, and all other facilities of the administration presently completed are ratified and approved;

(7) To turn any surplus over to the state treasury in the event that the administration shall accumulate a surplus in excess of the amount necessary for the efficient operation of the programs authorized by this chapter, except that an amount not to exceed 20 percent of that part of such surplus earnings as may be attributable to the production or services effort of any given production or other facility operated by or under the jurisdiction or supervision of the administration shall be creditable to the operating budget of the state operated penal institution upon which the production facility or services activity was based;

(8) To borrow money and to pledge any or all property owned by the administration as security therefor;

(9) To receive from any source, including, but not limited to, the state, municipalities and political subdivisions of the state, and the federal government, gifts and grants for its corporate purposes;

(10) To hold, use, administer, and expend such sum or sums as may be appropriated by authority of the General Assembly or the Office of Planning and Budget for any of the purposes of the administration;

(11) To provide training facilities for the prerelease rehabilitation and education of inmates confined in the state penal system; and

(12) To contract with any department, agency, or instrumentality of the state and any political subdivision thereof for the furnishing of any service which the Department of Corrections may provide. (Ga. L. 1960, p. 880, § 4; Ga. L. 1968, p. 1011, § 1; Ga. L. 1973, p. 1300, § 1; Ga. L. 1975, p. 1163, § 1; Ga. L. 1983, p. 1795, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 1989, p. 415, § 2; Ga. L. 1991, p. 94, § 42.)

**Cross references.** — Restriction on sale of goods manufactured by inmates of state or county correctional institutions, § 42-5-60.

#### OPINIONS OF THE ATTORNEY GENERAL

**Service-type industrial programs not permitted.** — The Georgia Prison Industries Administration (now Georgia Correctional Industries Administration) may not develop service-type industrial program such as furniture refinishing. 1970 Op. Att'y Gen. No. 70-156.

**Incentive pay plan for prisoners not authorized.** — The Board of Offender Rehabilitation (Corrections) is not authorized to institute an incentive pay plan for prisoners used

in industries in connection with this chapter. 1965-66 Op. Att'y Gen. No. 66-89.

**Hospital authorities may purchase goods** manufactured by the Correctional Industries Administration. 1970 Op. Att'y Gen. No. 70-88.

**Sales commissions.** — A salesman who is employed to dispose of products made in this state's prisons may be paid by the corporation on a commission basis. 1967 Op. Att'y Gen. No. 67-232.

#### **42-10-5. Responsibility for custodial care of inmates utilized by administration.**

The Department of Corrections shall have responsibility for the custodial care of all inmates utilized by the administration; and nothing in this chapter shall be construed to the contrary. (Ga. L. 1960, p. 880, § 5; Ga. L. 1985, p. 283, § 1.)

CHAPTER 11

INTERSTATE CORRECTIONS COMPACT

Sec.		ment of Corrections to carry out
42-11-1.	Short title.	compact.
42-11-2.	Enactment and text of compact.	
42-11-3.	Powers and duties of Depart-	

Administrative rules and regulations. — State of Georgia, Rules of Georgia Board of  
Interstate Corrections Compact, Official Offender Rehabilitation, Chapter  
Compilation of Rules and Regulations of 415-2-4.11.

42-11-1. Short title.

This chapter shall be known and may be cited as the “Interstate Corrections Compact.” (Ga. L. 1972, p. 584, § 1.)

42-11-2. Enactment and text of compact.

The Interstate Corrections Compact is enacted into law and entered into by this state with any other states legally joining therein in the form substantially as follows:

INTERSTATE CORRECTIONS COMPACT

ARTICLE I. PURPOSE AND POLICY.

The party States, desiring by common action to fully utilize and improve their institutional facilities and provide adequate programs for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party States to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society and effecting economies in capital expenditures and operational costs. The purpose of this Compact is to provide for the mutual development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources.

ARTICLE II. DEFINITIONS.

As used in this Compact, unless the context clearly requires otherwise:

- (1) “State” means a State of the United States, the United States of America, a Territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico;
- (2) “Sending State” means a State party to this Compact in which conviction or court commitment was had;



(3) "Receiving State" means a State party to this Compact to which an inmate is sent for confinement other than a State in which conviction or a court commitment was had;

(4) "Inmate" means a male or female offender who is committed, under sentence to or confined in a penal or correctional institution;

(5) "Institution" means any penal or correctional facility, including but not limited to a facility for the mentally ill or mentally defective, in which inmates as defined in (4) above may lawfully be confined.

### ARTICLE III. CONTRACTS.

(a) Each party State may make one or more contracts with any one or more of the other party States for the confinement of inmates on behalf of a sending State in institutions situated within receiving States. Any such contract shall provide for:

(1) its duration;

(2) payments to be made to the receiving State by the sending State for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs, or treatment not reasonably included as part of normal maintenance;

(3) participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom;

(4) delivery and retaking of inmates;

(5) such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving States.

(b) The terms and provisions of this Compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

### ARTICLE IV. PROCEDURES AND RIGHTS.

(a) Whenever the duly constituted authorities in a State party to this Compact, and which has entered into a contract pursuant to Article III, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party State is necessary or desirable in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party State, the receiving State to act in that regard solely as agent for the sending State.

(b) The appropriate officials of any State party to this Contract shall have access, at all reasonable times, to any institution in which it has a contractual

right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

(c) Inmates confined in an institution pursuant to the terms of this Compact shall at all times be subject to the jurisdiction of the sending State and may at any time be removed therefrom for transfer to a prison or other institution within the sending State, for transfer to another institution in which the sending State may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending State; provided, that the sending State shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under Article III.

(d) Each receiving State shall provide regular reports to each sending State on the inmates of that sending State in institutions pursuant to this Compact including a conduct record of each inmate and certify said record to the official designated by the sending State, in order that each inmate may have official review of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending State and in order that the same may be a source of information for the sending State.

(e) All inmates who may be confined in an institution pursuant to the provisions of this Compact shall be treated in a reasonable and humane manner and shall be treated equally with similar inmates of the receiving State as may be confined in the same institution. The fact of confinement in a receiving State shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending State.

(f) Any hearing or hearings to which an inmate confined pursuant to this Compact may be entitled by the laws of the sending State may be had before the appropriate authorities of the sending State, or of the receiving State if authorized by the sending State. The receiving State shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending State. In the event such hearing or hearings are had before officials of the receiving State, the governing law shall be that of the sending State and a record of the hearing or hearings as prescribed by the sending State shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending State. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving State shall act solely as agents of the sending State and no final determination shall be made in any manner except by the appropriate officials of the sending State.

(g) Any inmate confined pursuant to this Compact shall be released within the territory of the sending State unless the inmate, and the sending

and receiving States, shall agree upon release in some other place. The sending State shall bear the cost of such return to its territory.

(h) Any inmate confined pursuant to the terms of this Compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending State located within such State.

(i) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending State to act for, advise, or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect to any inmate confined pursuant to the terms of this Compact.

#### ARTICLE V. ACTS NOT REVIEWABLE IN RECEIVING STATE; EXTRADITION.

(a) Any decision of the sending State in respect to any matter over which it retains jurisdiction pursuant to this Compact shall be conclusive upon and not reviewable within the receiving State, but if at the time the sending State seeks to remove an inmate from an institution in the receiving State there is pending against the inmate within such State any criminal charge or if the inmate is formally accused of having committed within such State a criminal offense, the inmate shall not be returned without the consent of the receiving State until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending State shall be permitted to transport inmates pursuant to this Compact through any and all States party to this Compact without interference.

(b) An inmate who escapes from an institution in which he is confined pursuant to this Compact shall be deemed a fugitive from the sending State and from the State in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving State the responsibility for institution of extradition or rendition proceedings shall be that of the sending State, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

#### ARTICLE VI. FEDERAL AID.

Any State party to this Compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this Compact or any contract pursuant hereto and any inmate in a receiving State pursuant to this Compact may participate in any such federally aided program or activity for which the sending and receiving States have made contractual provisions; provided, that if such program or



activity is not part of the customary correctional regimen, express consent of the appropriate official of the sending State shall be required therefor.

#### ARTICLE VII. ENTRY INTO FORCE.

This Compact shall enter into force and become effective and binding upon the States so acting when it has been enacted into law by any two States. Thereafter, this Compact shall enter into force and become effective and binding as to any other of said States upon similar action by such State.

#### ARTICLE VIII. WITHDRAWAL AND TERMINATION.

This Compact shall continue in force and remain binding upon a party State until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the Compact to the appropriate officials of all other party States. An actual withdrawal shall not take effect until one year after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing State from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing State shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this Compact.

#### ARTICLE IX. OTHER ARRANGEMENTS UNAFFECTED.

Nothing contained in this Compact shall be construed to abrogate or impair any agreement or other arrangement which a party State may have with a non-party State for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party State authorizing the making of cooperative institutional arrangements.

#### ARTICLE X. CONSTRUCTION AND SEVERABILITY.

The provisions of this Compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this Compact is declared to be contrary to the constitution of any participating State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this Compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this Compact shall be held contrary to the constitution of any State participating therein, the Compact shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters. (Ga. L. 1972, p. 584, § 2.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 60 Am. Jur. 2d, Penal and Correctional Institutions, § 151.

**C.J.S.** — 72 C.J.S., Prisons and Rights of Prisoners, § 135.

**ALR.** — Right to try one for an offense other than that named in extradition proceedings, 21 ALR 1405. Extradition of escaped or paroled convict, or one at liberty on bail, 78 ALR 419.

**42-11-3. Powers and duties of Department of Corrections to carry out compact.**

The Department of Corrections is authorized to enter into contracts pursuant to the Interstate Corrections Compact and is directed to do all things necessary or incidental to the carrying out of this compact in every particular. (Ga. L. 1972, p. 584, § 3; Ga. L. 1985, p. 283, § 1.)

## CHAPTER 12

## PRISON LITIGATION REFORM

Sec.		Sec.	
42-12-1.	Short title.	42-12-6.	Determination as to whether prisoner's action frivolous.
42-12-2.	Legislative findings and determinations.	42-12-7.	Deductions from prisoner's accounts; payment of costs and fees as condition of parole.
42-12-3.	Definitions.	42-12-8.	Appeals.
42-12-4.	Payment from prisoner's inmate account for costs and fees of action commenced by prisoner.	42-12-9.	Records of prisoner actions.
42-12-5.	In forma pauperis procedure; contents and service of affidavit; judicial determinations.		

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**Effective date.** — This chapter became effective April 2, 1996.

**42-12-1. Short title.**

This chapter shall be known and may be cited as the "Prison Litigation Reform Act of 1996." (Code 1981, § 42-12-1, enacted by Ga. L. 1996, p. 400, § 1.)

**Law reviews.** — For review of 1996 prison litigation reform legislation, see 13 Ga. U. L. Rev. 280.

**42-12-2. Legislative findings and determinations.**

The General Assembly makes the following findings and determinations:

(1) The costs of litigation are rising dramatically. It is the responsibility of this body to seek out and adopt measures to rectify this situation. One source of the rise in litigation costs is frivolous prisoner lawsuits. Meritless lawsuits are being filed at an ever-increasing rate by prisoners who view litigation as a recreational exercise. To address the problems caused by the filing of nonmeritorious lawsuits and to relieve some of the burden placed on Georgia cities, counties, state agencies, the courts, and the Department of Corrections, this chapter is enacted.

(2) Before filing any sort of civil action, all citizens must evaluate the strengths of their claim in light of their own personal financial situation. Private individuals are forced to balance the strength of their case against the reality of court costs, filing fees, and the potential consequences of filing a frivolous or meritless lawsuit. Georgia's prisoners currently face no such dilemma. In light of the fact that all prisoners' needs are



provided at city, county, or state expense, a prisoner cannot claim that his or her financial status or security would be compromised by a requirement to pay court costs and fees. To address this inequity, the General Assembly enacts this chapter.

(3) In forma pauperis status will continue to allow the filing of an action by a prisoner, thus providing the prisoner with the constitutional right to access to courts. Freezing of the prisoner's inmate account will hold the prisoner responsible for court costs and fees by seizing any future deposits into the account. (Code 1981, § 42-12-2, enacted by Ga. L. 1996, p. 400, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, "is frivolous" was substituted for "are frivolous" in the second sentence of paragraph (1) and

"county, or state" was substituted for "county or state" in the fourth sentence of paragraph (2).

### 42-12-3. Definitions.

As used in this chapter, the term:

(1) "Action" means any civil lawsuit, action, or proceeding, including an appeal, filed by a prisoner but shall not include:

(A) A petition for writ of habeas corpus; or

(B) An appeal of a criminal proceeding.

(2) "Court costs and fees" means the initial filing fee set by the clerk of court and all fees incident to service of the lawsuit or amendments.

(3) "Indigent prisoner" means a prisoner who has insufficient funds in the prisoner's inmate account at the time of filing to pay the appropriate filing fee.

(4) "Prisoner" means a person 17 years of age or older who has been convicted of a crime and is presently incarcerated or is being held in custody awaiting trial or sentencing. (Code 1981, § 42-12-3, enacted by Ga. L. 1996, p. 400, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, a comma was

deleted following "prisoner" in the introductory language of paragraph (1).

### JUDICIAL DECISIONS

**Cited in** *Coles v. State*, 223 Ga. App. 491, 477 S.E.2d 897 (1996).

**42-12-4. Payment from prisoner's inmate account for costs and fees of action commenced by prisoner.**

The following provisions shall apply when an indigent prisoner commences an action:

(1) The indigent prisoner shall pay the current balance of funds in the prisoner's inmate account;

(2) The clerk of court shall notify the superintendent of the institution in which the prisoner is incarcerated that an action has been filed. Notice to the superintendent shall include:

(A) The prisoner's name, inmate number, and civil action number; and

(B) The amount of the court costs and fees due and payable;

(3) Upon notification by the clerk of court that an indigent prisoner has commenced an action, the superintendent shall:

(A) Immediately freeze the prisoner's inmate account; and

(B) Order that all moneys deposited into the prisoner's inmate account be forwarded to the clerk until all court costs and fees are satisfied, whereupon the freezing of the account shall be terminated. (Code 1981, § 42-12-4, enacted by Ga. L. 1996, p. 400, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, "superintendent" was substituted for "superintendent" in the second sentence of paragraph (2).

**42-12-5. In forma pauperis procedure; contents and service of affidavit; judicial determinations.**

(a) (1) A prisoner's affidavit of in forma pauperis status shall contain each of the following:

(A) The prisoner's identity, including any and all aliases, and the prisoner's inmate number;

(B) The nature and amount of any income as well as the source of that income;

(C) Real and personal property owned by the prisoner; and

(D) Cash and checking accounts held by the prisoner.

(2) The affidavit shall also contain the following sworn statement and signature of the prisoner:

I, \_\_\_\_\_, do swear and affirm under penalty of law that the statements contained in this affidavit are true. I further attest that this application for in forma pauperis status is not presented to

harass or to cause unnecessary delay or needless increase in the costs of litigation.

(3) The affidavit shall contain a copy of the prisoner's inmate account of the last 12 months or the period of incarceration, whichever is less. The institution shall promptly provide said account information upon request.

(4) The prisoner shall serve the affidavit, including all attachments, on the court and all named defendants.

Failure by the prisoner to comply with this subsection shall result in dismissal without prejudice of the prisoner's action.

(b) (1) A judicial order authorizing a prisoner to proceed in forma pauperis shall not prevent the freezing of a prisoner's inmate account nor the forwarding of any future deposits into that account to the court in accordance with the provisions of this chapter.

(2) In the event that the court denies the prisoner's application for in forma pauperis status, the court shall give written notice to the inmate that the inmate's action will be dismissed without prejudice if the filing fees are not paid within 30 days of the date of the order.

(3) Upon the denial of in forma pauperis status the court shall make a finding as to whether in forma pauperis status was sought fraudulently, frivolously, or maliciously. If the court finds that the in forma pauperis status was sought fraudulently, frivolously, or maliciously, the action shall be dismissed with prejudice, and the court shall assess filing costs.

(4) If an action is dismissed without prejudice and the prisoner refiles the action in substantially the same form:

(A) All filing requirements including filing fees must be met in their entirety; and

(B) No amount paid for court fees in any earlier action or any part thereof shall be credited to the prisoner. (Code 1981, § 42-12-5, enacted by Ga. L. 1996, p. 400, § 1.)

#### **42-12-6. Determination as to whether prisoner's action frivolous.**

Upon the dismissal of a prisoner action or upon the entry of judgment in favor of the responding party, the court shall make a finding as to whether the prisoner's action was frivolous. The court may award reasonable costs and attorney's fees to defendants or respondents if the court finds that:

(1) Any material allegation in the prisoner's in forma pauperis affidavit is false; or

(2) The action or any part of the action is malicious or frivolous as defined in Code Section 9-15-14. (Code 1981, § 42-12-6, enacted by Ga. L. 1996, p. 400, § 1.)



#### **42-12-7. Deductions from prisoner's accounts; payment of costs and fees as condition of parole.**

(a) Fifty percent of the average monthly balance of the prisoner's account for the preceding 12 months during which the prisoner's account had a positive balance shall be deducted from the prisoner's account and paid over to the clerk of court for each instance that a court finds that the prisoner has done any of the following:

- (1) Filed a false, frivolous, or malicious action or claim with the court;
- (2) Brought an action or claim with the court solely or primarily for delay or harassment;
- (3) Unreasonably expanded or delayed a judicial proceeding;
- (4) Testified falsely or otherwise submitted false evidence or information to the court;
- (5) Attempted to create or obtain a false affidavit, testimony, or evidence; or
- (6) Abused the discovery process in any judicial action or proceeding.

(b) Payment of any past due court costs and fees incurred by the prisoner may be, pursuant to this subsection, a condition of parole, at the discretion of the State Board of Pardons and Paroles. (Code 1981, § 42-12-7, enacted by Ga. L. 1996, p. 400, § 1.)

#### **42-12-8. Appeals.**

Appeals of all actions filed by prisoners shall be as provided in Code Section 5-6-35. (Code 1981, § 42-12-8, enacted by Ga. L. 1996, p. 400, § 1.)

### **JUDICIAL DECISIONS**

**Failure to comply with procedures.** — The Court of Appeals was deprived of jurisdiction over appeal from a prisoner's civil action concerning medical treatment the prisoner received because the prisoner failed to comply with discretionary procedures as required by this section. *Botts v. Givens*, 223 Ga. App. 139, 476 S.E.2d 816 (1996).

**Prisoner's failure to comply with discretionary appeal procedures** in appealing from the trial court's denial of prisoner's pro se petition for mandamus required dismissal of the action. *Jones v. Townsend*, 267 Ga. 489, 480 S.E.2d 24 (1997).

**Cited in** *Coles v. State*, 223 Ga. App. 491, 477 S.E.2d 897 (1996).

#### **42-12-9. Records of prisoner actions.**

The clerk of court shall maintain a list of all prisoner actions along with the disposition of each action and the identity of the judge that handled the action. (Code 1981, § 42-12-9, enacted by Ga. L. 1996, p. 400, § 1.)



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